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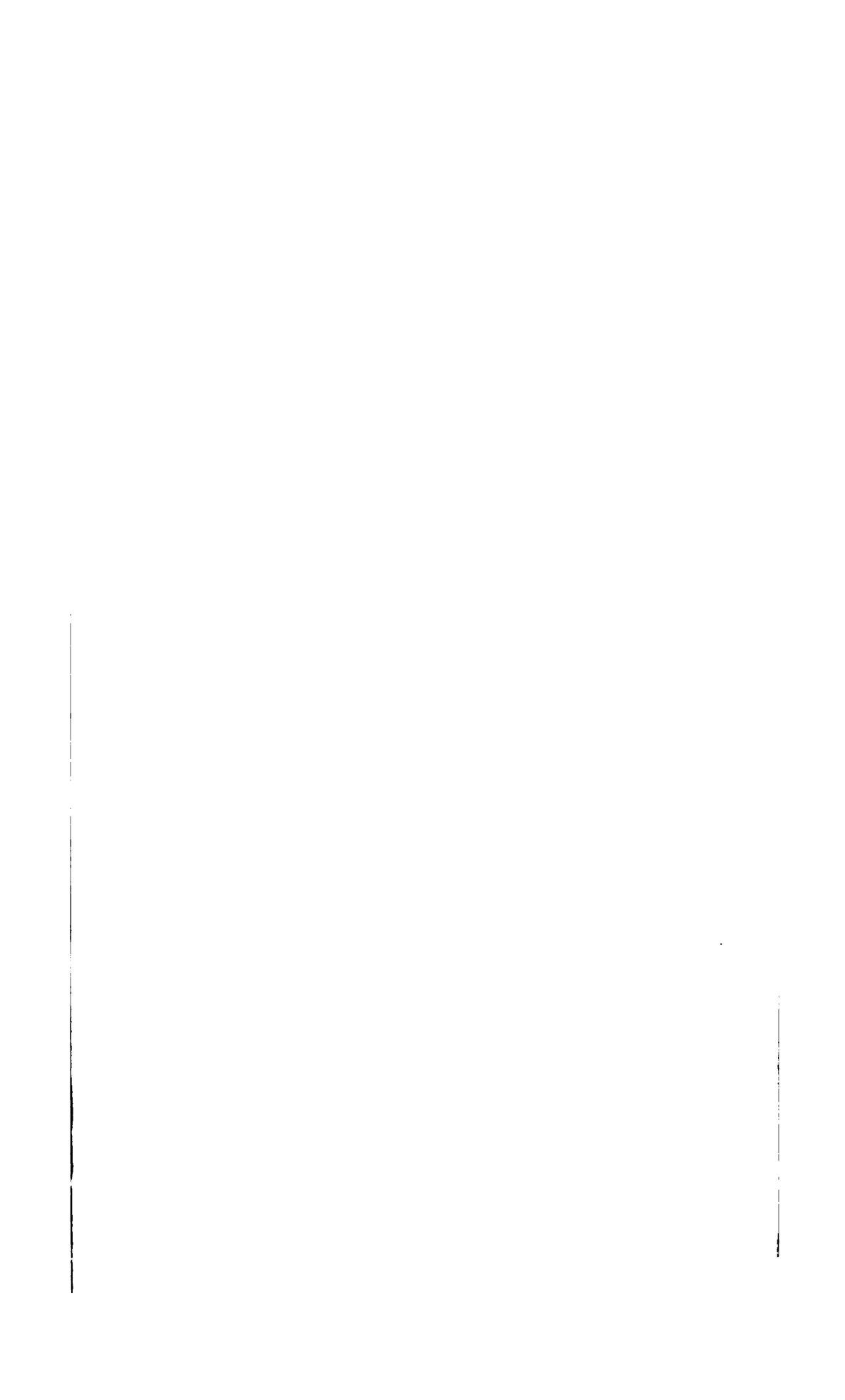


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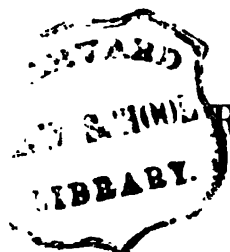


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EXCHEQUER REPORTS.



REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. I.

EASTER TERM, 25 VICT., TO HILARY VACATION, 26 VICT.,
BOTH INCLUSIVE.

BY

E. T. HURLSTONE, OF THE INNER TEMPLE,

AND

F. J. COLTMAN, OF THE INNER TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED
FROM THE CONTEMPORANEOUS REPORTS.

WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

SAMUEL DICKSON, ESQ.,

EDITOR.

PHILADELPHIA:


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JUDGES

or

THE COURT OF EXCHEQUER,

DURING THE PERIOD OF THESE REPORTS.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

Sir SAMUEL MARTIN, Knt.

Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.

Sir WILLIAM FRY CHANNELL, Knt.

Sir JAMES PLAISTED WILDE, Knt.

ATTORNEY-GENERAL.

Sir WILLIAM ATHERTON, Knt.

SOLICITOR-GENERAL.

Sir ROUNDELL PALMER, Knt.

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JONES v. JONES and Others. *April 29.*

A declaration in trespass alleged that the defendant broke and entered the plaintiff's dwelling-house and land, which dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and whilst the plaintiff was therein pulled down and destroyed the dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein, and ejected and expelled him and his family therefrom; and seized, converted, and destroyed the materials of the house. The defendant pleaded, as to breaking and entering, pulling down and destroying the dwelling-house and fixtures thereon, and seizing the materials, that he was entitled to common of pasture over the said land, and because the house was wrongfully erected on the land, so that without pulling down the same the defendant could not use or enjoy the common of pasture in so ample and beneficial manner as he otherwise would and ought to have done, he necessarily and unavoidably committed the trespasses in the introductory part of the plea mentioned in removing the house, doing no unnecessary damage, &c.

Held, that the plea was bad, since the defendant was not justified in pulling down the house when the plaintiff and his family were in it.

DECLARATION.—For that the defendants broke and entered the dwelling-house and land of the plaintiff, situate in the parish of Llandewy Brefi, in the county of Cardigan, and bounded on all sides thereof by certain common or waste lands called "Llandewy Brefi Mountain or Waste;" which said dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and then, and whilst the plaintiff was therein, pulled down and destroyed the said dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein; and then by so pulling down the said dwelling-house endangered the lives and hurt and injured the persons of the plaintiff and his family, and ejected and expelled them therefrom, and kept them so expelled for a long space of time; and also then seized and took away, and wrongfully converted to their own use, and destroyed the materials of the said house. *And by [*2 means of the premises the plaintiff was deprived of the use and possession of his said house and land, and was put to great expense in procuring another house and land, and was and is otherwise injured.

Third plea.—As to breaking and entering the dwelling-house and land, and pulling down and destroying the dwelling-house and fixtures therein, and seizing and taking the materials of the said house: that the defendant, John Jones, at the time of the alleged trespasses, was possessed of land, the occupiers whereof for thirty years before

this suit enjoyed, as of right and without interruption, common of pasture over the said land, for all their cattle, levant and couchant upon the said land of the defendant, John Jones, at all times of the year, as to the said land appertaining: that the alleged trespass to the said land was in use by the defendant, John Jones, of the said right of common; and because the said house had been wrongfully erected and then was wrongfully in and upon the said land, so that without pulling down the same the defendant, John Jones, could not use or enjoy his said common of pasture in and throughout the said land in so ample and beneficial manner as he otherwise would, might, and ought to have done, the defendant, John Jones, in his own right, and the other defendants as his servants and by his command, necessarily and unavoidably committed the alleged trespasses in the introductory part of this plea mentioned in removing the said house, doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the alleged trespasses in the introductory part of this plea mentioned.

Demurrer(a) and joinder therein.

*3] *Dowdeswell*, in support of the demurrer.—The plea affords no answer to the declaration. *Perry v. Fitzhowe*, 8 Q. B. 757 (E. C. L. R. vol. 55), is an express authority that the defendants were not justified in pulling down the house when the plaintiff and his family were in it. It is true that mere matter of aggravation need not be pleaded to, but the allegation that the plaintiff and his family were in the house is a substantial part of the complaint in the declaration. If a landlord distrains a horse upon which his tenant is riding, or the tools which he is using, that is illegal because it tends to a breach of the peace, and the landlord cannot justify the act by confining his plea to so much of the declaration as charges the distress. In like manner a sheriff cannot by pleading a writ of *fi. fa.*, justify a trespass in breaking open an outer door. *Davies v. Williams*, 16 Q. B. 546 (E. C. L. R. vol. 71), is distinguishable, because there the occupier had a previous notice and request to remove the building, but persisted in remaining with his family in it. Moreover the plea does not attempt to justify the assault. He also argued, that the plea was bad because it did not allege a seisin in fee with a prescription in a *que estate*, but merely alleged a right of common in the occupiers of land for a period of thirty years. On this point he referred to *Davies v. Williams*, and *Mellor v. Spateman*, 1 Wms. Saund. 343, 346.

Hannen, contra.—There is no doubt as to the right of a commoner to abate a nuisance on the common. *Perry v. Fitzhowe* is distinguishable; or if not, is inconsistent with subsequent decisions. There the defendant attempted to justify the expulsion of the plaintiff and his family from his house, in the exercise of a right of common.

*4] Here the justification is carefully limited. The allegation that the plaintiff and his family were in the house is a mere matter of aggravation. The defendants need only justify so much as the plaintiff must necessarily prove to maintain his action. If the defend-

(a) The plaintiff also replied, "that before and at the time of committing the trespasses in the introductory part of the said plea mentioned, and intended to be thereby justified, he, the plaintiff, was in the actual possession of the said dwelling-house, and actually and personally present in the same, and inhabiting therein; and that the defendants with force and arms, and in a violent manner and against the peace, broke and entered the said dwelling-house, and committed the said several trespasses." The defendant joined issue on the replication.

ants had merely pleaded not guilty, the plaintiff would not have been bound to prove that he and his family were in the house at the time it was pulled down. In *Harvey v. Bridges*, 1 Exch. 261,† Lord Denman observed, “that in the case of *Perry v. Fitzhowe* great pains were taken to distinguish the case of a peculiar and articulate justification of all the acts charged to have been committed, from a case like that of *Taylor v. Cole*, 3 T. R. 292, where it was evident from the plea that there were no acts of violence, but the words used in the declaration were only those of the ordinary language of law, stating a trespass committed with so much force as was necessary to change the possession.” [BRAMWELL, B.—Assuming that *Perry v. Fitzhowe* decided that a person has no right, in the abatement of a nuisance, to pull down a house while persons are in it, it is said that this declaration charges the pulling down the house while the plaintiff and his family were in it, and therefore the defendants ought to plead to that charge. But how are they to do it? Are they to begin the plea by saying that the plaintiff and his family were not in the house, and then justify as to the rest of the charge? That would be a novelty in pleading. Then does it not follow that the plaintiff, if he relies on the fact of his being in the house, should state it by way of replication?] That is the proper mode of pleading so as to raise the real question between the parties. If *Perry v. Fitzhowe* is not distinguishable from this case, it is inconsistent with subsequent decisions. In *Burling v. Reid*, 11 Q. B. 904 (E. C. L. R. vol. 63) the declaration charged the defendant with pulling down the plaintiff’s workshop *whilst he was inhabiting it and present in it: the defendant pleaded that [*5 the workshop was his, and not the plaintiff’s; and it was held immaterial whether the plaintiff was or was not inhabiting and present at the time of the alleged trespass. Lord Campbell there said:—“It would be giving a most dangerous extension to the doctrine in *Perry v. Fitzhowe* (assuming the decision there to be correct) if we were to hold that the owner of a house could not exercise the right of pulling it down, because a trespasser was in it.” *Davison v. Wilson*, 11 Q. B. 890 (E. C. L. R. vol. 63), is an authority to the same effect. The plaintiff must contend that there is a difference between the right to abate a nuisance on a common and on a person’s own soil. [WILDE, B.—*Burling v. Reid* and *Perry v. Fitzhowe* show a clear distinction between a man pulling down his own house and pulling down an inhabited house to abate a nuisance on a common.] It is only necessary to give notice before abating a nuisance, where there is no right to enter upon the land.

Dowdeswell, in reply.—In *Burling v. Reid* and *Davison v. Wilson* the house which the defendant pulled down was his own. The act of the defendant in pulling down an inhabited house on a common would be attended with risk of a breach of the peace. [POLLOCK, C. B.—The argument that an act is unlawful because it may lead to a breach of the peace, is very vague. What has a stronger tendency to a breach of the peace than the common “*molliter manus imposuit*,” where one man comes into actual collision with another? In the assertion of a right, a person is not bound to send for a policeman or to bring an action of ejectment, and why should not the same doctrine apply to a tenement erected on a common? WILDE, B.—The doctrine of abate-

*6] ment of nuisance is an exception to the general law of *England, that a man has no right to take the law into his own hands.] The fact that the plaintiff and his family occupied the house at the time the defendant pulled it down, is a substantial part of the declaration, and not mere matter of aggravation. *Cur. adv. vult.*

The judgment of the Court was now delivered by

CHANNELL, B.—The question in this case arises on a demurrer to the third plea, to which the plaintiff has replied as well as demurred. The decision of the question is of no importance to the parties except as regards the matter of costs. The plea was impeached principally on the authority of *Perry v. Fitzhowe*, 8 Q. B. 757 (E. C. L. R. vol. 55), which it was contended by the plaintiff was precisely in point. One member of the Court is of opinion that that case may be distinguished from the present, and that the principle intended to be there laid down may be gathered from the explanation of that case by Lord Denman, C. J., when delivering the judgment of the Court of Exchequer Chamber in *Harvey v. Bridges*, 1 Exch. 261.† The majority of the Court are, however, of opinion that *Perry v. Fitzhowe* is not distinguishable from the present case. We decline to express any opinion as to whether, if this question had come before us for the first time, we should have concurred in the judgment pronounced by the Court of Queen's Bench in *Perry v. Fitzhowe*; but, seeing that the question is of no importance except as regards costs, we think it better as the Court is not unanimous, to abide by that decision and leave the defendant, if dissatisfied with it, to take the case to a Court of error. Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

*7] *HUMPHREYS v. WELLING. April 17.

The defendant having petitioned the Court for the relief of insolvent debtors, his discharge was opposed by the plaintiff. An agreement was entered into between them, that the defendant should give the plaintiff a promissory note as a security for his debt, and that the plaintiff in consideration thereof should not oppose the making of a final order for protection. This arrangement was sanctioned by the Commissioner of the Court, who adjourned the final hearing to allow of its being effected. The promissory note was accordingly given, the opposition withdrawn, and the final order for protection made.—Held, that the agreement was illegal as against the policy of the law, and that the promissory note given in pursuance of it was therefore void.

THE declaration was on a promissory note made by the defendant for payment to the plaintiff of 16*l*.

Plea.—That, before the making of the said note and before the filing by the defendant of the petition hereinafter mentioned, the defendant was indebted to divers persons in divers sums of money, and among others to the plaintiff in a certain sum of money, to wit, 11*l*. 18*s*., together with costs, which the plaintiff had recovered against the defendant, and afterwards and before the commencement of this suit a petition for the protection of the defendant from process was duly, and according to the form of the statutes in that case made and provided, presented by the defendant to the Court for Relief of Insolvent Debtors in England, and a final order for protection and distribution was duly made in the matter of the said petition by a Commissioner of the

said Court duly authorized in that behalf, and the said debt was inserted, with all the necessary particulars, in the schedule of the defendant's debts annexed to the said petition, according to the provisions of the said statutes: that the said note was made and given by the defendant to the plaintiff, after the filing of the said petition and before the making of the said final order, as and for a new security for the payment to the plaintiff of the said debt from which the defendant was discharged as aforesaid, of and in pursuance of a certain unlawful agreement between the defendant and the plaintiff, that the plaintiff would forbear to oppose the making of the said final order. *And the plaintiff at all times aforesaid had power and right to oppose the making of the said final order; and the plaintiff, in [*8 pursuance of the said agreement and in consideration of having received the said note as aforesaid, did not oppose the making of the said final order of adjudication; and that save as aforesaid there never was any consideration for the defendant's making and giving the said note to the plaintiff, or for the plaintiff's receiving and holding the same.

Replication.—That before the making of the said final order in that plea mentioned the matter of the said petition was postponed by the said Commissioner of the said Court, in order to enable and for the express purpose of enabling the defendant to come to some arrangement with the plaintiff in respect of the said debt due from the defendant to the plaintiff, in the said plea mentioned, and with an intimation that no such final order would be made in the matter of the said petition unless such an arrangement were so made: and that, during such adjournment, an arrangement was accordingly made by • and between the plaintiff and the defendant in respect of the said debt, whereby it was arranged that the defendant should make and deliver the said note to the plaintiff for and on account of the said debt, and that accordingly the said note was made and delivered by the defendant to the plaintiff for and on account of the said debt in pursuance of such arrangement. And that such arrangement was made with the privity, consent, and allowance of the said Court in the said plea mentioned; and that, in fact, the said Commissioner would not make the said final order until such arrangement with the plaintiff, in respect of the said debt, had in fact been made; and so the plaintiff in fact says, that the said arrangement (being the said agreement in the said plea mentioned) was no fraud upon the said creditors *of the defendant, or the said Court making the said final order, or upon [*9 the laws applicable to the said petition.

Demurrer and joinder therein.

Addison argued for the defendant (Feb. 5).—The plea states that the note was given upon the illegal consideration that the plaintiff should withdraw his opposition to the defendant's discharge under the Insolvent Debtors' Acts. That is a good answer. But the effect of the illegality of that transaction is not obviated by the matter alleged in the replication, namely, that the arrangement was sanctioned by the Commissioner. The addition of that incident makes the transaction even worse than it appears on the plea. The policy of the law is that there should be a full disclosure of the affairs of an insolvent. In *Nerot v. Wallace*, 8 T. R. 17, it was held that a promise made by the friend of a bankrupt when he was on his last examination, that, in

consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, was void, as being against the policy of the bankrupt laws.—He was then stopped by the Court.

Hance, for the plaintiff.—The arrangement under which the note was given does not contravene the provisions of any statute. It is said, however, that it is against the general policy of the law that such a transaction should be allowed. That may be so where the security is given by the debtor in secret, and in fraud of the other creditors; but here, as alleged by the replication, it was done with the sanction of the Commissioner who, in open Court, adjourned the hearing *10] avowedly for the purpose of the arrangement. *By section 91 of the 1 & 2 Vict. c. 110, a creditor is prevented from suing on any security given for a debt from which the insolvent has obtained his discharge; but no similar provision is contained in the 5 & 6 Vict. c. 116, or the 7 & 8 Vict. c. 96, under which the petition in this case was presented. It may, therefore, be inferred that it was not the intention of the legislature that actions upon new securities should be prohibited. The defendant has had the full benefit of the contract, for he obtained his discharge through it; and he now seeks to take advantage of his own fraud.

Addison, in reply.—The case of *Nerot v. Wallace* shows that the sanction of the Commissioner to the giving the new security does not prevent the withdrawal of the opposition being an illegal consideration. [CHANNELL, B.—In *Taylor v. Wilson*, 5 Exch. 251,† it was held that a security given by a bankrupt to a creditor, in consideration of his forbearing to oppose the bankrupt's last examination, was not void under the 12 & 13 Vict. c. 106, s. 202, which makes void securities for debts given in consideration of the creditor's forbearing to oppose the allowance of the bankrupt's certificate.] In *Murray v. Reeves*, 8 B. & C. 421 (E. C. L. R. vol. 15), an agreement that a creditor should be appointed sole assignee of an insolvent debtor's estate, and should receive 100% out of it within three weeks from his appointment, in consideration of his withdrawing his opposition to the insolvent's discharge, was held void. Lord Tenterden, C. J., said:—"It is obvious that a measure of this kind takes from the Commissioners that superintendence, control, and power of imprisonment for a time, which the legislature intended to vest in them; and, consequently, deprives the other creditors of the benefit of that full disclosure, voluntarily and freely to be made, which they are entitled to have. Such bargaining, *11] whatever may have been *intended or effected in the particular case, may, in many cases, give protection to fraudulent concealment, to the great prejudice of creditors, and is, therefore, in our opinion, contrary to the policy of this part of the law, and, consequently, void." *Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—We are all of opinion that the plea is good, and that the replication affords no answer to it; and, therefore, our judgment ought to be for the defendant. The action is brought on a promissory note; there is a plea that the note was given in consideration of the plaintiff withdrawing his opposition to the defendant's

obtaining a final order for protection. It is unnecessary to cite the authorities which decide that the plea is good. There is a replication to the plea, stating that the agreement was made, and the note given, with the sanction of the Insolvent Court. We are all inclined to think that the Court had no authority to sanction such an arrangement: and we are of opinion that it was illegal, notwithstanding such sanction, and that no action can be maintained upon the note.

Judgment for the defendant.(a)

(a) Reported by W. Marshall, Esq.

*THE ATTORNEY-GENERAL v. KENT and Others. [*12
May 9.

In the year 1818, S., a Portuguese, came to England as agent of a wine Company, in which capacity he was employed until the year 1833. He continued to reside in England, and in the year 1857 was appointed attaché to the Portuguese Embassy, which office he held until his death in 1860. There was no evidence of his having visited Portugal, or communicated with any person there, after he came to England. In a will in his handwriting he stated that as he was a Portuguese subject, and an attaché, his property was not liable to legacy duty.

Held:—First, that S. acquired an English domicil. Secondly, that his appointment as attaché did not revive his domicil of origin, and consequently his personal property was liable to legacy duty.

INFORMATION in equity by the Attorney-General (so far as material), as follows:—

1. The object of this information is to obtain from the defendants, who are the executors of the will of Alexander Teixeira Sampayo, Baron de Sampayo, late of Barnes, in the county of Surrey, deceased, payment of the legacy duty which has become due to her Majesty in respect of the testator's personal estate, and the question for the decision of the Court is whether the testator was at the time of his death domiciled in England.

2. The testator died at Barnes, in the county of Surrey, on the 11th day of May, 1860. The Attorney-General is ignorant as to the place of his birth, but it is alleged by the defendants that he was born in the kingdom of Portugal or in some dependency thereof.

3. In the year 1819, the testator came to England, and had his fixed and permanent abode in this country down to the time of his death in 1860, as before stated, and during all or most part of that period, he was engaged in mercantile pursuits, by means of which he amassed a considerable fortune.

4. The testator on the 3d day of December, 1859, made his last will and testament in writing of that date, and duly executed the same in the manner and with the formalities required by the English law, and he therein described himself as "Alexander Teixeira Sampayo, Baron de Sampayo, *a Portuguese subject, and an Attaché to the Lega- [*13
tion of His most Faithful Majesty the King of Portugal, now residing at Barnes, in the county of Surrey." And he appointed the above-named defendants executors of his will.

5. After the testator's death, that is to say, on the 2d day of June, 1860, the above-named defendants duly proved his will in her Majesty's Court of Probate.

6. Application has been made to the defendants for payment of legacy duty in respect of the testator's personal estate, but they refuse to pay the same, on the ground, as they allege, that the testator was not at the time of his death domiciled in England; and they allege that, in the year 1857, the then King of Portugal made the testator an attaché of the Portuguese Embassy in this country, and conferred on him the rank of Baron, and that such appointment was notified to and recognised by the Foreign Office in this country, and that on the ground of such appointment the testator claimed and obtained exemption from the payment of assessed and other taxes; and they insist that under these circumstances, the testator was at the time of his death a Portuguese subject, and domiciled in Portugal.

7. The Attorney-General insists that the testator, by residing and engaging in trade in this country or otherwise, had acquired an English domicile previously to the year 1857, when, as the defendants allege, he was made attaché to the Portuguese Embassy here, and that the English domicile which he so acquired was not thereby lost, but continued to be the testator's domicile at the time of his death, and that therefore his personal estate is subject to legacy duty, and that the defendants, as executors of his will, are liable to pay the same.

Prayer.—That it may be declared that the testator, Alexander *14] Teixeira Sampayo, Baron de Sampayo, *deceased, was domiciled in England at the time of his death, and that legacy duty is payable to her Majesty in respect of his personal estate, and that the defendants are accountable for the same, &c.

The answer of the defendants was as follows:—

1. The testator died at Barnes, in the county of Surrey, on the 11th day of May, 1860. The testator was born, as we are informed and believe, at Angra in the Island of Terceira, one of the Western Islands or Azores, then and still part of the dominions of the King of Portugal, in the year 1795, and was the son of Portuguese parents, who had always, up to the time of his birth as aforesaid, been resident in the said Island of Terceira.

2. The testator, as we are informed and believe, came to England in or about the year 1818 (having, however, previously visited England), in the capacity of a commissioner or agent, to manage in London the affairs and business of an incorporated Portuguese association called the "Oporto Wine Company," in which the then King of Portugal was largely interested, and which was established under the authority of the Portuguese Government for the purpose of extending the sale of Portuguese wines in England, and continued to reside in London, in such capacity of Commissioner or agent of the said Company, until the year 1833, when the said Company ceased to exist. From the year 1828 to the year 1833 the testator also held, jointly with his late brother Francisco Teixeira, Baron de Sampayo, the office of financial agent and representative of the Portuguese Government in London. The testator resided at Barnes aforesaid from the year 1833 until the time of his death. But we say that the testator was not, except as aforesaid, engaged in mercantile pursuits, and that he did not acquire thereby any considerable fortune, as alleged in the information.

*3. The testator made his last will and testament in writing on the 3d day of December, 1859, and executed the same in [*15 the manner and with the formalities required by the English law, and therein described himself as in the fourth paragraph of the said information mentioned, and thereby appointed us executors of his said will. The said will would be valid according to the law of Portugal, being made according to the law of the country in which the testator actually was at the time of making his will, although he was, as we insist, at that time and at the time of his death, domiciled in Portugal. The testator had previously thereto signed several testamentary papers in his own handwriting, in one of which, bearing date the 3d day of December, 1857, and which, but for the execution of the said will of the 3d day of December, 1859, would have been the last will and testament of the testator, the said testator stated as follows:—"As I am a foreigner who always intended to return to my country, and besides being an attaché of the Legation of His most Faithful Majesty the King of Portugal, in London, my property is not subject to legacy duty." The said will of 3d December, 1859, was prepared by the defendant, Francis Thomas Bircham, who was the testator's solicitor, and who omitted so much of the above passage as related to legacy duty without any communication thereon with or instructions from the testator.

4. We proved the said will of the 3d December, 1859, in Her Majesty's Court of Probate on the 2d day of June, 1860.

5. We refuse to pay legacy duty in respect of the testator's personal estate, on the ground that the testator was, as appears from the facts set forth in the information and in the answer, domiciled at the time of his death in the kingdom of Portugal, and also on the ground that the *testator was, in the year 1857, appointed by his late [*16 Majesty the then King of Portugal, an attaché to the legation of his Majesty in England, which appointment was duly notified to and recognised by her Majesty's then Principal Secretary of State for Foreign Affairs, and which appointment the testator continued to hold from the year 1857 until his death, and in respect of which the testator, in the year 1858, claimed and obtained from the Board of Inland Revenue an exemption from the payment of assessed taxes.

The Attorney-General, The Solicitor-General, Locke, and Hanson, for the Crown.—There are two questions: first, what is the conclusion from the evidence, apart from any special influence of the testator's diplomatic character? Secondly, what effect had that character? This is stronger than any case in favour of the conclusion that the testator acquired an English domicile which continued up to the time of his death. There exists both the factum and the animus, for there is the fact of a protracted residence in England, without an animus revertendi. At the age of twenty-four the testator came to England, and was engaged in commerce from the year 1818 to the year 1833. That alone would be some evidence of the animus or intention to change his domicile. Moreover, he continued to reside in this country until his death in 1860, and it does not appear that he ever visited his native country, or communicated with any person there. A series of cases have established that personal property, having no *situs* of its own, follows the domicile of its owner; and the question

whether legacy duty is payable depends on the place of domicile at the time of the testator's death: *Thompson v. The Advocate-General*, 12 Cl. & F. 1. The principle on which the doctrine proceeds is *17] "*mobilia sequuntur personam*." *[MARTIN, B.—That was acted upon in the recent case of *The Attorney-General v. Pottinger*, 6 H. & N. 733.†] If the testator had not been appointed an attaché of the Portuguese Embassy, there could have been no question. Then what is the influence of the diplomatic character? None whatever; because, when once the domicile is ascertained, there must be a departure to some other place with an intention to remain there. It will, perhaps, be argued that there was a constructive departure because the testator accepted the office of attaché to a foreign embassy. That argument is founded upon language used for a different purpose by writers on international law. Thus, in *Vattel*, bk. 1, ch. xix., § 217, it is said, "that children born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen who is absent with his family on the service of the state, but still dependent on it and subject to its jurisdiction, cannot be considered as having quitted its territory." Again, in *Wheaton on International Law*, pt. 3, ch. 1, § 15, it is said: "To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal status and rights of property, whether derived from contract, inheritance, or testament. His children born abroad are considered as natives." That is stated by Lord Stowell, in the case of *The Caroline*, 6 Rob. Adm. Rep. 468, to be a mere fiction of law, which ought not to be extended. The testator, as member of a foreign embassy, was entitled, during his life, to all the privileges and immunities conceded by the comity of nations to persons engaged in the diplomatic service; but that cannot *18] affect the domicile which he acquired in England. If a foreigner comes to this country in a diplomatic character, and remains here however long, no inference can arise of an intention to acquire an English domicile, because his residence must naturally be referred to a desire to carry out the orders of his sovereign; but where a foreigner has acquired an English domicile, the fact of his appointment as attaché to an embassy cannot revive his domicile of origin. Notwithstanding the general rule, a foreign ambassador may, by his declarations and acts, coupled with residence, acquire an English domicile: *Heath v. Samson*, 14 Beav. 441. At all events, that case is an authority that where a foreign ambassador has acquired an English domicile, it is not affected by his having accepted another diplomatic employment from his own government. The expressions of the testator in the will of 1857 tend to show a consciousness that he had acquired an English domicile, and a desire that his property should not be subject to legacy duty. The expression of an intention not to renounce a domicile of origin cannot prevail against the intention and facts collected from the acts of the party, if they are otherwise sufficient to constitute a domicile abroad: *In re Steer*, 3 H. & N. 594.† So,

where a British subject has resided for a long period in a foreign country, the *animus revertendi* and claim to be considered a British subject will not preserve his domicile of origin, if from other circumstances there is evidence of his having acquired a foreign domicile: *Stanley v. Bernes*, 3 Hag. Eccl. Rep. 373.—They also referred to *In re Bruce*, 2 C. & J. 486,† and *Bruce v. Bruce*, 2 Bos. & P. 229, note.

Montague Smith, Dr. Phillimore, and Welsby, for the defendants.—No legacy duty is payable. First, there is no *evidence from which it can be inferred that the testator acquired an English [*19 domicile beyond the mere fact of residence. A domicile of origin is not easily changed, and, when it is, it easily reverts. Then, was it ever in this case changed? The testator was a Portuguese subject, who, about the year 1818, came to England as agent of a wine Company established under the authority of the Portuguese Government, and continued in that capacity until the year 1833. No inference can be drawn from his appointment in 1857 as attaché that he intended to abandon his Portuguese domicile. The only declaration which occurs is that in the will, and which shows that he had no intention to acquire an English domicile. In *Heath v. Samson*, 14 Beav. 441, there was cogent evidence of the *animus* or intention of the testator to abandon his domicile of origin. If any inference is to be drawn from the fact of an appointment to a diplomatic office, is it not more likely that a person would be appointed who had not renounced, but retained an interest in, his own country? The *factum* is not enough unless it is accompanied by the *animus*. [WILDE, B.—Mr. Justice Story,^(a) after mentioning a variety of definitions of domicile, says that “it would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.”] The presumption of law is against an intention to abandon a domicile of origin, and the *onus probandi* is on the party who affirms it. There is a category of persons who are incapable of acquiring a domicile in this country—persons who are entitled to the privilege of extra-territoriality. *Hodgson v. De Beauchesne*, 12 Moore, P. C. 285, was the case of a military officer; but an ambassador and his suite are equally incapable of acquiring a domicile in this country.—Secondly, assuming that the *testator acquired an English domicile, his appointment as [*20 attaché revived his domicile of origin, and exempted him from the taxation of this country. By the law of nations, an ambassador is not subject to the civil or criminal law of the country in which he resides, because, by a fiction of law, he is, for all legal purposes, considered as being in his own country. [MARTIN, B.—You say it is the same as if he had lived and died on board a Portuguese ship.] No doubt. His marriage in this country, according to the Portuguese form, would have been valid. In *Black. Com.*, vol. 1, p. 253, it is said: “The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside.”

(a) *Conflict of Laws*, chap. 3, § 43.

[BRAMWELL, B.—Do you say that if the testator had acquired an English domicile, nevertheless, upon his being appointed attaché, he would lose that domicile?] He would for the purpose of taxation. An appointment as attaché is inconsistent with an English domicile. In Black. Com., vol. 1, p. 253, it is said: "He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made; but an ambassador ought to be independent of every power except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions." As an ambassador is not subject to taxation during his life, it would be inconsistent if his property were liable to legacy duty after his death. [WILDE, B.—where is good reason for that. The immunity of an ambassador is a species of personal immunity; but if domiciled here, his property *21] after his death is *administered or protected by the English law.] The 7 Ann. c. 12, which prohibits the arrest of ambassadors and their servants, was only declaratory of the common law: *Triquet v. Bath*, 3 Burr. 1480. The exemption of an ambassador from the municipal law of the country in which he resides depends on the law of nations. It is not on account of the sacredness of the person of an ambassador that he cannot be sued, but because he is independent of the jurisdiction of the country in which he resides: *Vattel*, bk. iv. c. viii. § 110. By a fiction of law he is regarded as the person whom he represents, and is considered as not being within the territory of the state to which he is accredited, and consequently not subject to its laws: *Wildman on International Law*, vol. 1, p. 92. The maxim, "*mobilia sequuntur personam*," applies to this case. *Grotius* lays down the rule, that the personal property of an ambassador cannot be seized as security, nor taken in execution by judicial process, nor, as some have supposed, by the prerogative of the Crown, for any debts by him contracted; for an ambassador should be exempt from all restraint, that he may have entire security.^(a) The law is stated in similar terms in *Wheaton on International Law*, pt. 3, ch. 1, § 15. A servant appointed by the ambassador is in a different position; for he is in no way connected with the Crown, but is merely appointed for the personal convenience and comfort of the ambassador. That distinction is adverted to in *Taylor v. Best*, 14 C. B. 487 (*E. C. L. R.* vol. 78). In *Story's Conflict of the Laws*, ch. iii., § 48, it is said:—"Ambassadors and other foreign ministers retain their domicile in the country which they represent, and to which they belong." The privilege is not the privilege of the individual, but of the Crown. Originally, when a foreign sovereign came to this country, by the comity of nations all his acts were supposed to be done in his own *22] *country. The principle was extended to a man-of-war, which is considered as a floating part of the foreign country, and marriages and wills made on board are governed by the law of that country. The principle was further extended to ambassadors and their suite; and no instance can be found of duty having been paid in this country upon the personal property of an ambassador after his death. There is no distinction in this respect between the personal property of an ambassador and that of one of his suite. The 7 Ann.

(a) *Lib. ii., cap. 18, s. ix.*

c. 12, s. 5, provides that no servant of a foreign minister shall take advantage of that Act unless registered, and it is not denied that the testator was registered. The privilege during life, and the privilege after death, cannot be separated, because they are founded on the same principle, viz. extra-territoriality. [MARTIN, B.—Suppose the testator had resided all his life, up to the year 1857, in England, and had declared that he was domiciled here; but in 1857, having received a diplomatic appointment, he went to Portugal, saying, “I am going for a temporary purpose, and intend to return to England, my place of domicil,” and he afterwards died in Portugal, would not his personal property in England be subject to legacy duty?] Not if he held the diplomatic office at the time of his death. The principle of the decision in *Hodgson v. De Beauchesne*, 12 Moore, P. C. 285, was that the testator, being in the service of the Crown of England, retained his English domicil though he resided and died in France. The foundation of the law is a passage in Grotius,^(a) where it is said that ambassadors by a certain fiction are considered in the place of those who send them, and by a similar fiction, they are, as it were, *extra territorium*, and thus are not bound by the civil law of the people among whom they live. Again, it is laid down^(b) *that the movable [*23 property of an ambassador cannot be taken or impounded for debt. It is also said in Foelix, *Traité du Droit International Privé*, liv. ii., tit. ii., chap. 2, sect. iv., that an ambassador and his suite enjoy a complete immunity from the law of the state in which they reside. [WILDE, B.—That relates to an exemption during his life; the reason for it ceases after his death.] It would be a violation of the comity of nations to tax an ambassador during his life, because he is considered as part of the Crown, and his movable property as belonging to the Crown; therefore to tax his property after his death would be the same as taxing the property of the Crown: Vattel, Bk. 4, Ch. 8, § 113; id. Bk. 4, Ch. 9, § 120. Bynkershoek, *Fo. Leg.*, cap. 5, lays down the proposition in similar terms. In cap. 10, he points out the distinction between a consul and an ambassador, and why the former is subject to the civil law, viz. because he does not represent the Crown. In cap. 15, there is a passage which expresses the identity which exists between the suite of an ambassador and the ambassador himself. It is conceded, on the part of the Crown, that if a foreigner is accredited to this country in an ambassadorial character, although he may remain here all his life he will not acquire an English domicil, and therefore will not be subject to the municipal taxation of this country, nor will his personal estate be liable to legacy duty after his death. The principle on which that is founded is that an ambassador is deemed to be a resident in the country by which he is accredited, just as the sovereign of that country, if he came to England, would be deemed to be a resident in his own country. In Story's *Conflict of Laws*, sect. 48, it is said: “Ambassadors and other foreign ministers retain their domicil in the country which they represent, and to which they belong. Then, assuming that the testator had acquired an English domicil, his appointment as attaché conferred on him all *the rights and privileges of an ambassador, and re- [*24 vived his domicil of origin the same as if he had returned to

(a) Lib. ii., cap. 18, s. 5.

(b) Lib. ii., cap. 18, s. ix.

Portugal, or had lived and died on board a Portuguese man of war. It does not depend on the factum or animus, but it is a domicile cast on the party by operation of law. In Story's Conflict of the Laws, § 49, after describing in what manner a domicile, whether of birth, choice, or otherwise, may be acquired, changed, or lost, it is said:—"From these considerations and rules the general conclusion may be deduced, that domicile is of three sorts; domicile by birth, domicile by choice, and domicile by operation of law." In the case of *Le Verguire*, 5 Rob. Adm. Rep. 99, Lord Stowell said:—"It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native born subject than to impress the national character on one who is originally of another character."

The Attorney-General replied.

POLLOCK, C. B.—I am of opinion that the Crown is entitled to judgment. It is established by the case of *Thomson v. The Advocate-General*, 12 Cl. & F. 1, that the payment of legacy duty, or the immunity from such payment, depends on the domicile of the party whose property is concerned; and the appointment of the testator as attaché to the Embassy of Portugal does not appear to me to vary the case, for after the decision in *Heath v. Samson*, 14 Beav. 441, that a foreigner may fill the office of ambassador to a foreign power and yet be domiciled in England, it is clear that the testator might be domiciled in England notwithstanding he was an attaché.

*25] Then the question is, whether the testator was domiciled in England before his appointment as attaché. It appears to me he was, for the circumstances under which his residence commenced, and the total absence of any visit to his own country, or of any communication with any person in that country, tend to show that long residence in England had that effect which Lord Stowell, in the case of *The Harmony*, 2 Rob. Adm. Rep. 322, 324, said ought to be attached to time. I think the declaration in the will, which was not the last, is entitled to very little, if any, consideration. At the time the testator was appointed attaché he was domiciled in England, and, in my opinion, his appointment to that office did not put an end to his English domicile, or confer upon him any right to resort to a Portuguese domicile. For these reasons I think that the testator at the time of his death was domiciled in England, and therefore his property is liable to legacy duty.

MARTIN, B.—I am of the same opinion. When the case is understood, it is very plain. The claim is for legacy duty, which is a duty imposed by act of parliament upon the personal property of deceased persons, the exigencies of the State requiring it. It has been established for years that, in order to ascertain the liability to duty chargeable on personal property, it is necessary to ascertain the domicile of the person to whom the property belonged; for the liability to legacy duty is governed by domicile.

Then the first question is, whether the circumstance of the testator having been at the time of his death an attaché to the Portuguese Embassy in any way alters his domicile. I think not; and the case of *Heath v. Samson*, 14 Beav. 441, is a direct authority to the contrary. So long as the testator lived, he was exempt from payment

of taxes by the rule of international law referred to; but this question arises *after his death; and what is there in the exemption, to which he was entitled during his life, to prevent his [*26 property being subject to legacy duty after his death? I apprehend there is nothing. Is there anything in the circumstance that at the time of his death he filled the office of attaché to the Portuguese Embassy? According to the case of *Heath v. Samson* he may have filled the office of ambassador to a foreign state, and, nevertheless, have retained an English domicile. That being so, the question is one of fact, where was the domicile of the testator at the time of his death? According to Mr. Justice Story's (a) definition, "that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom." In Dr. Phillimore's *Book on Domicil*, (b) it is stated that, in the opinion of the author, the American judges have laid down the more correct definition, and that it is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there an unlimited time." Then, applying that to this case, what are the facts? The testator was born in 1795, and came to England in 1818, when he was only twenty-three years of age. He came, as agent of the Portuguese Government, to superintend a trade in Oporto wines, and so continued until the year 1833, when the business ceased. Up to that time, if I were called upon to draw an inference, I should be inclined to say that his domicile was Portugal. From the year 1833 up to the year 1857 he resided at Barnes, in Surrey, and during all that time he was as much domiciled in England as a foreigner could be. Then did anything afterwards take place to indicate a change of domicile? His appointment as attaché, in my judgment, had not that effect. It was an *office of honour, showing the estimation in [*27 which he was held by the Sovereign of his native country, and entitling him to certain privileges; but what is there in that to show that he had formed any intention to abandon his English domicile? There is this circumstance, that in a will in his handwriting he says, "As I am a foreigner who always intended to return to my country, and besides being an attaché, &c., my property is not subject to legacy duty." Now I find it stated by Mr. Justice Story, (c) "that if a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." Therefore, giving full credit to the statement of the testator, that he had an intention to return to Portugal, that would not alter the domicile which he acquired in this country. Perhaps I am drawing too strong an inference from his statement, but assuming that such was his real intention, it seems to me that it is not sufficient to alter his domicile. For these reasons I am of opinion that the Crown is entitled to judgment.

BRAMWELL, B.—I am of the same opinion. Setting aside for a moment the nature of the office of attaché, and the effect which it is

(a) *Conflict of Laws*, Ch. iii., § 43.

(b) *Chap. ii., sect. xv. p. 13.*

(c) *Conflict of Laws*, Ch. iii., § 46.

contended it would have upon the acquired domicile of the testator, if he had one, I am of opinion that the testator, at the time of his death, had an English domicile. I will not repeat the arguments used by my brother Martin, which are to my mind demonstrative. Giving the greatest weight to the considerations in favour of the testator's intention to return, at some time or other, to his native country; and adopting any definition of domicile most favourable to the defendants,

*28] I am *nevertheless of opinion that the testator, at the time of his death, had an English domicile.

It is said that the effect of his accepting the office of attaché was, that notwithstanding the *factum* and *animus*—his continuous residence in England for a series of years and his evident desire to retain an English domicile—the fact of his having become an attaché would cause him to lose that domicile; because an ambassador and his suite are extra-territorial, and therefore, as soon as the testator was appointed attaché, he became as it were out of England and in Portugal. I am clearly of opinion that it is not so, and I cannot help adverting to what was said by Lord Mansfield in *Mostyn v. Fabrigas*, Cowp. 177, "It is a certain rule that a fiction of law shall never be contradicted to defeat the end for which it was intended, but for every other purpose it may be contradicted." Assuming that the Portuguese ambassador and his suite are exempt from local jurisdiction, because they may be considered as residing in Portugal; that is only for the purpose of their protection, dignity, and comfort, not for the purpose of rendering their property free from legacy duty after their death. We must not be supposed to be deciding contrary to the comity of nations. We do not say that if a foreigner came to England and resided here as ambassador for forty or fifty years, he would thereby, simpliciter, acquire an English domicile and his property become subject to legacy duty. What we say is that a foreigner, having acquired an English domicile, does not lose it, *ipso facto*, by accepting a diplomatic appointment. For these reasons I am satisfied that the Crown is entitled to judgment.

WILDE, B.—I am of the same opinion. The principle on which to decide whether the domicile of an individual has been determined or

*29] not, has been stated by the rest of *the Court; and the facts show that this case comes within that principle. There was a long continuous residence in England without any declaration of an intention to leave it; and there is the fact of the individual dying in this country. There is therefore strong evidence of an English domicile.

Then the question is whether the fact of the testator having filled the office of attaché from the year 1857 until his death altered the domicile which he had previously acquired. It has been argued that it did, because by a fiction of law it put him out of England and into Portugal. But, I agree with my brother Bramwell, that is straining the fiction of law to a purpose which was never intended. I am fortified in that opinion by a passage in Wheaton on International Law,^(a) which was relied on by the defendants' counsel: "From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence until he leaves the country,

(a) Pt 3, Ch. 1, § 15.

he is entitled to entire exemption from local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or state by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from local jurisdiction the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign." To the same effect is the passage cited from Grotius,^(a) in which he uses the words "quasi extra territorium;" meaning only that such is the sacredness of the person of an ambassador, and his immunity from the civil and criminal law of the country in which he resides, that he is to be regarded as residing within his own country. It may be observed, that subjection to the civil and criminal law does not depend upon domicil. A foreigner who comes to *this country [*30 is subject to the civil and criminal law of England, though he may not be domiciled here; and as the obligation of those laws upon him does not depend on his domicil, so the immunity from them does not show that he is not domiciled in this country. It seems to me that the argument has wholly failed to establish that the testator ceased to be domiciled in England, because he enjoyed those immunities.

But a wider and more dangerous argument was used, to the effect that whether the testator was domiciled here or not, the law of this country as to property chargeable with legacy duty did not apply. Domicil has its rights as well as its burthens; and it would be hard if a foreigner, by becoming an ambassador, lost his English domicil, though he might wish to retain it. There is no authority to support such a proposition. A dictum has indeed been quoted, to the effect that personal effects or movables belonging to a minister within the state where he resides are entirely exempt from the local jurisdiction^(a)—a very untenable proposition. But the next passage is this:—"Nor is the personal property of which he may be possessed, as a merchant carrying on trade, &c., exempt from the operation of the local law; and, following that out in *Taylor v. Best*, 14 C. B. 487 (E. C. L. R. vol. 78), the Court of Common Pleas considered that the exemption only extended to movables, which could not be interfered with without affecting his personal comfort and dignity as an ambassador. Assuming that the exemption was the same after death as during life, still it would only extend to a certain class of property, which is not the subject of this information. For these reasons I am of opinion that the Crown is entitled to judgment.

Decree accordingly.

(a) Lib. ii., Cap. 18, §.

(b) *Wheaton on International Law*, Pt. 3, Chap. 1, § 18.

*31] *THE ATTORNEY-GENERAL v. LADY ROWE.

May 12.

In 1856 R., whose domicile of origin was England, was appointed Chief Justice of Ceylon, during the pleasure of the Crown, and he resided with his family there, in the exercise of the duties of his office, until his death in 1860. He left a library and other effects in England, and he invested large sums of money on mortgage in Ceylon.—Held that, in the absence of any evidence of an intention to acquire a foreign domicile, R. retained his domicile of origin, and therefore his personal property was subject to legacy duty.

INFORMATION in equity by the Attorney-General as follows:—

1. The object of this information is to obtain from the defendant, who is the sole executrix of the will of her late husband, Sir William Carpenter Rowe, Knight, deceased (hereinafter referred to as the "testator"), payment of the legacy duty which has become due to her Majesty, in respect of the testator's personal estate; and the question for the decision of the Court is, whether the testator was at the time of his death domiciled in England.

2. The testator died at Colombo, in the Island of Ceylon, some time in the month of November, 1859.

3. He was born in England of English parents, and resided in England, practising as a member of the English bar, down to the beginning of the year 1856, previously to which time he had been appointed one of her Majesty's counsel. In the month of February, 1856, he was appointed by her Majesty to be Chief Justice of the Island of Ceylon; and, in consequence of such appointment, he shortly afterwards left England and proceeded to Ceylon, and with his wife and family continued to reside in the island, holding during the whole period the said office of Chief Justice there, down to the time of his death.

4. The mode of appointment to the said office is by letters patent, under the seal of the island, which are prepared and issued pursuant to and in accordance with the directions contained in a Royal warrant addressed to the Governor of the island requiring him so to do. The warrant for the appointment of the testator to be Chief Justice of *the island was (according to the usual form of such war-
*32] rants) in the following terms:—

"To our trusty and well-beloved Sir Henry George Ward, Knight, Grand Cross, &c., our Governor and Commander-in-Chief, in and over our Island of Ceylon, &c., &c.

"Trusty and well-beloved, we greet you well. We being well satisfied of the loyalty, integrity, and ability of our trusty and well-beloved William Carpenter Rowe, Esquire, one of our counsel learned in the law, have thought fit hereby to authorize or require you forthwith to cause letters patent to be passed, under the seal of our Island of Ceylon, constituting and appointing him, the said William Carpenter Rowe, to be Chief Justice of our said island, in the room of our trusty and well-beloved Sir William Ogle Carr, Knight, to have, hold, exercise, and enjoy the said office and place during our pleasure, with all the rights, profits, privileges, and advantages thereunto belonging or appertaining, and you are to cause to be inserted in the said letters patent a clause or proviso, obliging him the said William Carpenter Rowe to actual residence within our said island, and

to execute the said office in his own person, except in case of sickness or other incapacity, and all such other clauses and provisoes as are requisite and necessary in this behalf, and for so doing this shall be your warrant. Given at our Court at Buckingham Palace, this 8th day of February, 1856, in the 19th year of our reign."

5. The testator, while residing in the said Island of Ceylon, made his last will and testament in writing, dated the 15th day of October, 1859, and signed the same in the presence of five witnesses present at the same time, who attested and subscribed the same in his presence; and he therein described himself as "Sir William Carpenter Rowe, Knight, Chief Justice of Ceylon;" and he thereby constituted his wife, the above-named defendant, sole executrix *of his said will. He died at Colombo, as before stated, in the month of November [*33 following, holding at the time of his death the office of Chief Justice of the said island.

6. The defendant proved the testator's said will, in the Principal Registry of Her Majesty's Court of Probate, on the 6th day of March, 1860, and thereby became and is now the sole legal personal representative of the testator. But she has not paid legacy duty in respect of the testator's personal estate, and she declines to pay the same, alleging that she is advised that the testator was not at the time of his death domiciled in England, but was domiciled in the island of Ceylon, and that consequently no such duty is payable. The defendant has in her possession the probate of the testator's will, and she ought to produce the same if necessary.

Prayer.—That it may be declared that the testator, Sir William Carpenter Rowe, was domiciled in England at the time of his death, and that legacy duty is payable to her Majesty in respect of his personal estate, and that the defendant is accountable for the same, &c.

The answer of the defendant was as follows:—

1. I admit that the several statements contained in the said information are correct and true, but I crave leave to add thereto the facts following, (that is to say),

The testator, after his said appointment, and while he resided in the island of Ceylon, invested a large sum of money, that is to say 20,000*l.* and upwards, on mortgage of real property in the said island of Ceylon; and in respect thereof, and of other personal property in the said island, I, after his death, obtained probate of his said will from the District Court of Colombo in the said island.

2. I decline to pay legacy duty on the personal estate of the testator, on the ground that, upon the facts set forth in the information, and in this my answer thereto, the *testator was at the time of his death domiciled in the island of Ceylon and not in England. [*34

The Attorney-General, The Solicitor-General, Locke, and Hanson, argued for the plaintiff (May 9).—The testator was domiciled in England at the time of his death. He did not remove the whole of his property to Ceylon, and no doubt his intention was to remain there so long as his health permitted him to discharge the duties of his office, and then to return to England. It is not that sort of indefinite intention which depends on contingencies which may never happen; but an intention which, in the ordinary course of events, must at some time have been carried into effect, if the testator had lived so long.

His domicile of origin was England, and therefore the onus is on the defendant to show that, *animo et facto*, he acquired a Cingalese domicile. There is no evidence of an intent to abandon his domicile of origin, except that he went to Ceylon to fulfil the duties of a judicial office, which he held at the pleasure of the Crown, and which he might at any moment have resigned. This case is different from that of a person who formerly went to India in the civil or military service of the East India Company, for there the Indian domicile was based upon the nature of the occupation, the fulfilment of which imposed upon him the obligation of permanent residence. In that case, the law presumed an intention consistent with his duty, and held his residence to be *animo et facto* in India: *Forbes v. Forbes*, Kay 341. Here it was not only at the option of the testator how long he should remain in Ceylon, but he held his appointment at the pleasure of the Crown. This case resembles another class, where persons leave England in a public capacity of a temporary nature; in which case the English domicile is not lost. In the case of a governor of *a colony,

*35] the place in which the duties of his office require him to reside does not affect his domicile of origin. That distinction is pointed out in *The Attorney-General v. Napier*, 6 Exch. 217,† where it was held that an officer in her Majesty's service who died while on duty in India, did not acquire a domicile in that country; but it was otherwise with an officer in the service of the East India Company, because in the latter case there was an obligation of permanent residence. In *Phillimore on Domicil*, chap. vii., p. 61, reference is made to the following rules laid down in the French Code respecting the domicile of officers in the civil or military service of the state:—"If the office be conferred for the life of the holder and irrevocable, the law fixes his domicile in the place where its functions are discharged, and admits of no proof to the contrary; 'for the law,' says Denisart, 'will not presume an intention contrary to an indispensable duty.'" "If the office be of a temporary and revocable nature, the law does not presume that the holder has changed his original domicile, but allows the fact that he has done so to be established by the usual proof." Lord Cottenham, in his judgment in *Munro v. Munro*, Cl. & F. 842, 876, said, "Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the law of England, but generally by the law of other countries." Then is the fact of the testator having accepted this office of uncertain tenure, and having gone to Ceylon for the purpose of fulfilling its duties, reasonable evidence of an intention to acquire a domicile in that coun-

*36] try? In defining domicile, and what is necessary to *effect a change of domicile, jurists have adopted sometimes an affirmative and sometimes a negative form of definition. Thus, according to Vattel, Bk. 1, ch. xix., § 218, "Domicil is an habitation fixed in some place with an intention of remaining there always." Therefore a man does not establish a domicile in any place unless, either tacitly or by express declaration, he makes known his intention of always remaining there. Then the negative form of definition is, if a person takes

up his habitation sine animo revertendi—there must be the absence of a definite intention to return. The mere expression of a hope or desire to return is consistent with remaining abroad so long as the particular engagement may render it necessary, which may be for the whole period of life. In Story's Conflict of Laws, Ch. iii., § 44, it is said: "Two things must concur to constitute domicil, first, residence; and, secondly, the intention of making it the home of the party. There must be the fact and the intent; for, as Potier has truly observed, a person cannot establish a domicil in a place, except it be animo et facto." Here there is a factum, but not the animus. In Phillimore on Domicil, Ch. x., p. 147, after stating the result of the doctrines of the Jurists, reference is made to the following passage in Menochius: (a) "Et primum dicendum est *habitationem et domicilium* inter se differere. Nam *domicilium* habere quis dicitur in loco qui animo ibi commorandi perpetuò habitat. Is verò qui pro emptione aliqua ex causâ, putâ studiorum, vel litis, vel simili commoratur, *habitare* dicitur." And the learned author says: "The merchant engaged in a special, or limited venture; the student who resides for the sake of prosecuting his studies; the individual retained by the prosecution of a lawsuit; the officer employed by the state in a particular service; all fell under this exception of the civilians, because they were held to *retain their intention to return to their [*37 original domicil." In The Attorney-General v. Pottinger, 6 H. & N. 733,† it was held that the domicil of origin was revived on the return of the testator from China to England, and was not lost by his subsequent residence as Governor of the Cape of Good Hope, and declaration of his intention to return to India. The Attorney-General v. Dunn, 6 M. & W. 511,† shows how completely the factum and animus must concur in order to effect a change of the domicil of origin. Neither the nature nor the tenure of the office which the testator accepted required him to entertain any intention of acquiring a foreign domicil; for every duty of that office might be fulfilled consistently with a temporary residence in Ceylon. [BRAMWELL, B.—Suppose an Englishman went abroad under an engagement to stay there thirty years; and he said, "I shall stay here for thirty years and then return to England," but in the meantime he died, would he have acquired a domicil in that place?] It is submitted that he would not. The moment the absence of intention to remain is ascertained, residence becomes immaterial. If a person goes abroad under an obligation to remain there for an indefinite period, as was formerly the case with a covenanted servant of the East India Company, he has no option of returning at any time: Bruce v. Bruce, 1 Bos. & P. 229, note, Craigie v. Lewin, 3 Curt. Eccl. Rep. 435. [BRAMWELL, B.—There is that difference between the case of a covenanted servant and a barrister.] It may be said that the fact of the testator having taken his wife and family to Ceylon, was indicative of an intention to change his domicil; but he clearly never intended that the residence of his family should have any permanent character beyond the contingent duration of his official residence. [BRAMWELL, B.—The same remark would apply if he had only gone for a year.] Upon the *face of his will there is strong evidence of the testator's intention to return to England. [*38

He left in the custody of his relations in England, amongst other effects, a library of books, which he disposes of by his will.(a) A similar circumstance occurred in the case of *Wicker v. Hume*, 7 H. L. 124, 147, and that was held a strong indication to return to this country when circumstances rendered it desirable to do so.—They also referred to *Story's Conflict of the Laws*, sect. 46, p. 45.

Karslake and Welsby, for the defendant.—The testator, at the time of his death, was domiciled at Ceylon. It is erroneous to say that, in every case, it is necessary to show an intention to acquire a new domicile. Although that is correct as a general proposition, there are exceptional cases. If a person went to India in the civil or military service of the East India Company, an intention to return, however strongly expressed, would not affect the question of his domicile, because he had no power of returning. So, in this case, the testator accepted an appointment which bound him to reside at Ceylon during her Majesty's pleasure. [POLLOCK, C. B.—A Judge is under no obligation to hold the office any longer than he pleases.] The testator could not vacate his office unless his tender of resignation was accepted. [POLLOCK, C. B.—There is this difference between a civil and a military officer; if the latter were to go away, he would be liable to be tried by a court-martial, and punished; but in the case of a Judge it would only be disrespectful not to tender his resignation and wait *39] until his *successor was appointed.] There is no case in which it has been laid down that, in order to change a domicile of origin, it is necessary that the appointment to an office in a foreign country should be for life. The word "permanent" is not used in the sense of continuing during life, but merely "not limited in duration." In *The Attorney-General v. Pottinger*, 6 H. & N. 733, 747,† *Bramwell, B.*, referring to *Ex parte Steer*, 3 H. & N. 594,† substituted for "permanent" the word "indefinite," as a more correct expression. Here the appointment was for an indefinite time. [BRAMWELL, B.—I do not think the term "permanent" is incorrect, except that it is ambiguous. It may mean "for ever," or for "an enduring time."] Domicil has been defined by American Judges as "an indefinite intention of remaining;" *Elbers v. Krafts*, 16 Johns. Amer. Rep.; "a permanent settlement for an indefinite time;" *The Francis*, 8 Cranch 363; 1 *Binney*, Amer. Rep. 349, note; "a residence at a particular place, accompanied with positive proof of continuing there for an unlimited time;" *Guiz v. Daniel*. But in *Phillimore on Domicil*, chap. 2, p. 13, it is said that the more accurate definition is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." The onus is not on the defendant to show that the testator intended to abandon his domicile of origin. This case does not differ from that of an officer in the service of the East India Company, for the acceptance of the office of Judge imposed upon the testator the obligation of residing at Ceylon for an indefinite period. An Indian officer, at the time of his appointment, might have the fullest intention of resigning at the end of four

(a) The following passage in the will was referred to by the Attorney-General:—"I bequeath to my son William all my books and other effects in the custody of my sister Mrs. Gurney, of Grebursag, Cornwall; and to my son Francis all the books now in the custody of Mrs. Storey in Bryanston Square, his grandmother; save and except such of them as are law books, all of which I bequeath to my nephew, William Covyndon Gurney."

or five years, but that would not prevent him from acquiring an Indian domicile. *So here it is immaterial whether the testator intended to return to England at some future time of his life, for as long as he remained in Ceylon that was his home, and therefore *prima facie* his domicile. By the terms of the warrant he was obliged to execute the office in his own person, except in case of illness, and consequently so long as he retained his office he was as much bound to reside in Ceylon, as an Indian officer was formerly bound to reside in India; so that there was an enforced residence for an indefinite time. [WILDE, B.—That assumes that he could not of his own will have resigned the office, and therefore he would hold it for life if the Crown did not think fit to relieve him. POLLOCK, C. B.—A person who accepts an office during the pleasure of the Crown is no more bound to retain it than a tenant at will is bound to remain at the will and pleasure of his landlord.] There being no stipulation that the testator might of his own will resign the office, he was bound to hold it until relieved of it by the Crown. An office held during the pleasure of the Crown is held during an indefinite time. A military officer cannot resign his commission without the consent of the Crown. [WILDE, B., referred to *Com. Dig. "Officer" (K. 9).*] Under the terms of this warrant the testator accepted the office, and undertook to hold it, during the pleasure of the Crown. [POLLOCK, C. B.—That is a perversion of its meaning. The Crown merely retains the power of terminating the appointment at any moment.] The French Code is no authority in this case, for the rules there laid down are rules of that particular Code, and do not profess to be of universal application. *Craigie v. Lewin*, 3 Curt. Eccl. Rep. 435, is an authority that they do not govern the English law of domicile. The law as to Indian officers is thus stated by Wood, V. C., in *Forbes v. Forbes*, Kay 341, 356:—"I apprehend the question does not *turn upon the simple fact of the party being under an obligation by his commission to serve in India, but when an officer accepts a commission or employment the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and hold his residence to be *animo et facto* in India."—Secondly, assuming that the testator did not hold his office for an indefinite period, the question arises whether in accepting the office he did not intend to resign his English domicile, at all events whilst he remained in Ceylon. [BRAMWELL, B.—Suppose a person on going abroad said, "I mean to go to Paris and not to come back again, but I do not mean to have a French domicile." What would be the effect of that?] *Ex parte Steer*, 3 H. & N. 594,† is an authority, that though a person may use the strongest expressions that he does not intend to give up his domicile of origin, they will not prevail against the facts which show that he has done so. If a person said, "I do not intend to give up my English domicile, but I intend to be domiciled for the next twenty years in Ceylon;" if he resided there he would acquire a Cingalese domicile for that period. The testator did not go to Ceylon for a temporary or special purpose, as in the case of a merchant, or student, or others mentioned in the passage cited from Phillimore on Domicil, p.

147, but with the object of remaining there an indefinite period. The obligation to remain for an unlimited time rendered it necessary that he should acquire a domicile in Ceylon; *Hodgson v. De Beauchesne*, 12 Moore, P. C. 285. The testator does not in his will describe himself as of England, but as Chief Justice of Ceylon. The fact that he left his books in England is entitled to little or no weight, for he took *42] with him to Ceylon all his *household goods. If the question of intention is to be regarded, there are many criteria of a Cingalese domicile. There is the character and permanent nature, of the appointment; the facts that he took with him his wife and family, and invested a large sum of money on mortgages in Ceylon. The direction in his will that, after his death, his property should be invested in the English funds, tends to show that he contemplated dying in Ceylon. They also referred to Story's Conflict of the Laws, p. 45, and the judgment of Lord Thurlow in *Bruce v. Bruce*, Bos. & P. 229, note.

The *Attorney-General* replied.

Cur. adv. vult.

POLLOCK, C. B., now said.—We are all of opinion that the Crown is entitled to judgment.

It appears to me that our decision may be rested on a very short ground. In the case of *Aikman v. Aikman*, 3 Macqueen 854, 877, Lord Wensleydale said:—"The rule of law is perfectly settled. Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animus et facto*; and the burthen of proof unquestionably lies on the party who asserts that change." Lord Wensleydale goes on to say that this rule is laid down in the case of *Somerville v. Somerville*, 5 Ves. 749, 787.

Applying that rule to this case, the testator's domicile of origin having been England, what is there to show that he acquired a domicile in Ceylon? He accepted a judicial office at Ceylon during the pleasure of the Crown; but there is not a single fact which indicates *43] an intention *to reside there permanently. It is true, he took with him his wife and family, and all the ordinary appurtenances of civilized life; but it appears that he left behind him his library, and, if any conclusion is to be drawn from that, it is that he intended to return to England.

The ground on which I rest my decision is, that the domicile of origin is clear, and there is nothing to show, in point of fact, an intention to change that domicile; therefore the domicile remained, and the Crown is entitled to judgment.

BRAMWELL, B., said.—I am also of opinion that the Crown is entitled to judgment.

The question which arises upon a claim to legacy duty, is, whether the testator, at the time of his death, acquired a Cingalese domicile. His domicile of origin was England, and he retained that domicile, which subjects his personal estate to legacy duty, unless he acquired a Cingalese domicile. That depends on the *factum* and *animus*.

The facts are, that the testator was appointed to a judicial office at Ceylon; he accepted it, and went there to fulfil the duties he had undertaken. There is scarcely another material fact; because, although other matters are stated, they are of little value. The infer-

ence I draw from the facts is that he intended to stay until such a time as practically (for no time is limited) his pension would be earned. If his health had been good, and the emoluments of his office greater than the pension, and the climate had agreed with him, and he liked the society of the place and the duties of his office, he probably would have stayed in Ceylon after the time when he had practically earned his pension. On the other hand, if his health had failed, the climate become disagreeable, and he had succeeded in getting a pension for a term of service short of the ordinary time, he would probably have returned to England.

*That is the view I take of the facts, treating them as facts found by the special verdict of a jury; and then the question [*44 is, whether I can come to the conclusion that the testator acquired a Cingalese domicil. That must, to some extent, depend upon the meaning of the word "domicil," and, in my opinion, nothing can be more vague. I find it stated in Phillimore on Domicil, Chap. 2, p. 13, that Lord Alvanley commended the wisdom of a great jurist, named Bynkershoek, in not giving a definition of that word; and certainly it is difficult for any one to do so. Mr. *Karslake* relied on the definition in Phillimore on Domicil, founded on the dicta of American judges:—"A residence at a particular place, accompanied by positive or presumptive proof of an intention to continue there for an unlimited time." If that means an endless time it is scarcely an accurate expression; if it means a residence without any actual time assigned to it, it is probably more accurate. Another expression relied on is "An indefinite intention of remaining;" the next is: "A permanent settlement for an indefinite time." or probably it might be more correct to say, "an indefinite permanency." With these is coupled the expression: "If a person has a vague and floating intention of returning, that will not prevent his acquiring a domicil." Such definitions seem to me to arise from a vague notion of the term "domicil," and certainly it is very difficult to define it.

In Phillimore on Domicil, Chap. 2, p. 13, there is a suggestion which Mr. *Welsby* made, and which occurred to me, whether the word "domicil" may not be interpreted by substituting for it the word "home," not in the sense in which a person going to a lodging which he has taken for a week at a watering-place might say he was "going home;" nor in the sense in which an Englishman, residing in a colony and intending to live and die in England, might say he was "coming home;" but using the word in the sense in which a man would say, "I have no home; I live sometimes in London, sometimes [*45 in Paris, and sometimes in Rome." Mr. *Welsby* says, "Adopt that word, and what would have been the answer of the testator if he had been asked, where was his home? "In Ceylon." But I doubt whether he would not have said: "I am staying at Ceylon, and may do so for a considerable time; but my home is England."

However, I have not been able, applying any of the tests which I have suggested, or any of the authorities which I have had an opportunity of consulting, to determine with precision what is "domicil." I have had recourse to the 36 Geo. 3, c. 52, s. 2, the original Act imposing legacy duty, which is general in its terms and comprehends this case. It is true, as said by Tindal, C. J., in *Thomson v. The*

Advocate-General, 12 Cl. & F. 1, that "the very general words of the statute, 'every legacy given by any will or testamentary instrument of any person,' must, of necessity, receive *some* limitation in their application, for they cannot in reason extend to every person everywhere, whether subjects of this kingdom or foreigners, whether at the time of their death domiciled within the realm or abroad." That being so, it is said that the limitation in the Act extends only to those persons who are domiciled in England. That leads me to this consideration, may not the word "domicil" have a different meaning according to the purpose for which it is used? According to the authorities collected in Phillimore on Domicil, it is clear that the word "domicil" may have a different meaning under different circumstances. Then, I ask, why should the testator's domicil be said to be out of England, so as to exempt his personal estate from the payment of legacy duty? I can see no reason, though I can well *46] understand that, for many purposes, he *might be considered as domiciled in Ceylon. Suppose some Cingalese law required a will to be made in a particular form, it would be a hardship to say that he was so domiciled there as to require his will to be made in that form. Therefore, looking at the Act of Parliament, and the construction put upon it by Tindal, C. J., viz., that it is limited to persons domiciled in England, the question is whether there is in this case such a domicil.

It was said that the testator was as much bound to reside in Ceylon as a civil or military officer of the East India Company was formerly bound to reside in India, because he could not resign his judicial office without the consent of the Crown. I doubt that; but it is not necessary to discuss the point, because it is admitted that practically the Crown never refuses its consent. So, in the case of an Indian officer, the East India Company never withheld its consent to his resignation; and therefore it was said that, as the two cases are similar, they ought to follow the same rule. I own I thought it difficult to see the distinction between this case and that of a barrister who goes to make his fortune in India, but, on consideration, I think there is a vast difference between the case of a young man who goes to India with the desire to obtain a position and acquire a competency, and then return to England, and the case of a Judge, who is presumed to be a person who has already obtained a position, and who goes with a certain income and at a time of life which renders it probable that he only intends to stay abroad a few years?

For these reasons I think that our judgment ought to be for the Crown.

WILDE, B., said.—Domicil, no doubt, is a question of fact; and in general there is a greater collection of facts from which the Court is *47] to draw its conclusion, than in *the present case. The Court has already laid down an important rule as to domicil.(a) The facts in this case are extremely meagre. The testator went as a Judge to Ceylon; but the case is devoid of any expressions or act of his, from which the Court can draw a conclusion that he intended to make that place his domicil. The fact that he left his library in England points the other way. The onus is on those who wish to estab-

(a) The Attorney-General v. Kent, ante, p. 12.

lish a foreign domicile; and they have nothing to rely upon but the isolated fact, that the testator accepted a judicial office and went to Ceylon. England was his domicile of origin; he had lived there all his life, and he left on his appointment as Chief Justice of Ceylon. There was nothing permanent in the nature of that appointment, nothing inconsistent with his domicile of origin. If regarded strictly, and without the knowledge which we extra-judicially possess, it was a colonial office during the pleasure of the Crown, and therefore of a temporary nature; if regarded with the light of that knowledge, it was an office to be enjoyed for a limited time, after which a pension would probably have been granted to him. It is therefore a case of residence adopted for a special and temporary purpose, and for a time which, though not definitely fixed, was not likely to be indefinitely prolonged. Such a residence does not, in my opinion, of itself create a domicile, though possibly a domicile might emanate from such a residence if protracted for a considerable time. In this case there was no such lapse of time, and therefore, in my opinion, no new domicile was acquired.

It was said that, as the grant of the office was during the pleasure of the Crown, the testator could not by any act of his own, and in the exercise of his own discretion, divest himself of it. That was a mere proposition, wholly unsupported by any authority or analogy, and I see no reason for *adopting it. If we did, it might probably [*48 lead to a different conclusion.

For these reasons I agree that our judgment ought to be for the Crown.
Decree accordingly.

JONES v. NIXON. *April 28.*

A demise for "a term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice; and if not determined, a subsisting tenancy from year to year.

DECLARATION.—For that the plaintiff by deed, bearing date the 2d of February, A. D. 1860, let to the defendant a house, buildings, and land, to hold to the defendant, to wit, for three years from the said 2d of February, A. D. 1860, as to the said land, and from the 2d of May, A. D. 1860, as to the said house and buildings, and unless the said tenancy should be then determined by a six months' previous notice to quit, the same to continue afterwards as a tenancy from year to year, until it should cease by notice to quit at the usual times; rendering therefore during the said term the yearly rent of 150*l.* for the first two years, and 180*l.* for the third year and every succeeding year respectively, payable half-yearly by equal payments on the 2d of July and the 1st of February in every year, the first of such half-yearly payments to be made on the 2d of July, 1860. And the defendant by the same deed covenanted with the plaintiff to pay him the said rent during the said term, and so long after as the defendant should continue as yearly tenant of the premises as aforesaid, on the days and in the manner aforesaid. Yet one half-year of the said

rent, amounting to 75*l.*, afterwards, and during the said term, became due to the plaintiff on the 2d of July, A. D. 1861, and is still in arrear and unpaid.

*49] Plea.—That the material parts of the deed, whereby the *said premises were let to the defendant as in the declaration mentioned, were and are in the following words:—This indenture made the 2d of February, 1860, between James Jones of, &c., of the one part, and William Nixon of, &c., of the other part, witnesseth that the said J. Jones doth hereby demise unto the said W. Nixon, his executors, &c., all that estate, farm, and lands, called, &c.; to hold the said premises unto the said W. Nixon, his executors, &c., for the term of three years from the day of the date of these presents, as to the land, and as to the dwelling-house and buildings from the 2d of May next, determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times: rendering therefore during the said term the yearly rent of 150*l.* for the first two years, and 180*l.* for the third and every succeeding year, by equal payments on the 2d of July and the 2d of February in every year; the first of such half-yearly payments to be made on the 2d of July next.—And the defendant says that the lease contained covenants by the defendant that he would, “during the said term and so long after as he should continue a yearly tenant,” pay the yearly rent, &c., “and at the legal expiration, or sooner determination of the said term, yield up the said premises,” &c.; and a covenant by the plaintiff for quiet enjoyment “during the said term.”—Averment: that before the accruing due of the rent in the declaration mentioned, the defendant gave the plaintiff a six months' notice to determine the said term of three years at the end of the first year thereof.—The plea then set out the notice, and averred that it was served upon the plaintiff more than six calendar months before the expiration of the said first year of the said term, to wit, on the 30th of July, A. D. 1860.

Demurrer and joinder therein.

*50] *Millward* appeared in support of the demurrer, but the Court called on

C. Hutton to support the plea.—According to the true construction of the lease, there was a demise for a term of three years, determinable at the option of the lessor or lessee, by a six months' notice prior to the end of the first or second year. The stipulation as to six months' notice would otherwise be nugatory, for the term would expire without notice at the end of the third year. The words, “otherwise to continue from year to year until the term shall cease by notice to quit at the usual times,” show that the intention of the parties was that the term should be determinable by a six months' notice to quit, in the same way as if it was a demise from year to year for three years. “Determinable” must mean “capable of being determined before the term of three years expires.” [POLLOCK, C. B.—The meaning is that the term of three years may be determined by six months' notice, ending with the third year; if not, the demise is to continue from year to year. That is the only construction which gives effect to the contract. BRAMWELL, B.—I should have thought the defendant's construction right, but for the expression “otherwise

to continue from year to year," &c. That must refer to the tenancy after the expiration of the three years.]

PER CURIAM.(a)—There must be judgment for the plaintiff.

Judgment for the plaintiff.

(a) Pollock, C. B., Martin, B., and Bramwell, B.

*The MAYOR, ALDERMEN, and BURGESSES of the BOROUGH of BRECON v. EDWARDS. April 28, 30. [*51]

A sale by sample, on a market-day, near to but without the limits of the market is not a disturbance of the market, unless it is done designedly and with the intention to evade payment of toll.

THE declaration stated that, at the time of the committing of the grievances, &c., the plaintiffs were possessed of a market for the sale of corn, grain, &c. holden in the borough of Brecon, in the county of Brecon, on Saturday and Wednesday in every week, together with tolls, stallages, and other profits to the said market appertaining, and that all persons selling corn and grain on Saturdays and Wednesdays, within the said borough, *of right ought to sell the same within the said market, or at their own respective dwelling-houses, shops, or premises, and not elsewhere, within the said borough.* That the defendant disturbed the said market of the plaintiffs, and prevented their enjoyment thereof, and of the said tolls, stallages, and other profits, by unlawfully selling certain corn and grain on the said market-days at and in a place within the said borough near to, but outside of, the place where the said market of the plaintiffs was holden as aforesaid (the said place where the defendant so sold the said corn and grain as aforesaid not being the dwelling-house, shop, or premises of the defendant), whereby the plaintiffs lost the tolls and profits which would have been paid to them upon the sale of the said corn and grain had the same been sold within the said market, and could not and did not enjoy their said market and the tolls and profits thereof in so ample and beneficial a manner as they of right ought to have done, &c.

Pleas.—First: not guilty. Secondly: that all persons selling corn and grain on Saturdays and Wednesdays, within the said borough, ought not of right to sell the same within *the said market, or [at their own respective dwelling-houses, shops, or premises, and not elsewhere, within the said borough, as alleged.—Issues thereon. [*52]

The cause came on for trial, before Byles, J., at the last Spring Assizes for the county of Brecon, when a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

By an Act passed in the year 1838 (1 & 2 Vict. c. xii., local and personal), intituled "An Act for providing market-places and for regulating the markets within the borough of Brecon, in the county of Brecon," after reciting that the markets for supplying the inhabitants of the borough of Brecon, in the county of Brecon, and the neighbourhood thereof, with corn, grain, and agricultural produce, fish, poultry, and other provisions, and with live and dead stock and certain other

commodities, had been long held in the principal streets and other public thoroughfares within the said borough, whereby the same are rendered dangerous and inconvenient to the inhabitants and the public at large passing through the same; and that the market for buying and selling butcher's meat, and also cheese, butter, seeds, hops, and other things, had been usually held in an enclosed space under the Guildhall of the said borough; and that the mayor, aldermen, and burgesses of the said borough were willing and desirous to erect a proper market-place and buildings for the sale of meat, fish, &c., with proper stalls, standings, and other accommodations therein, it was, among other things, enacted:—

Sect. 42. "That the tolls theretofore payable in respect of the market in the said town should continue until the intended new market should be completed and opened for public use; and upon and from and after the opening thereof there should be paid to the said mayor, aldermen, and burgesses, or to the person appointed by them to *53] receive the *same, by every person holding, using, or occupying any stall or standing, or selling, or offering or *exposing to sale*, any meat, fish, &c., corn, grain, flour, &c., *brought into the said markets, or either of them*, such tolls, rents, and stallages as should from time to time be fixed and appointed by the said mayor, aldermen, and burgesses, not exceeding the several tolls, rents, and stallages specified in the second schedule to that Act annexed," &c. In case of refusal or neglect to pay toll, power was thereby given to the mayor, aldermen, and burgesses to levy the same by distress and sale of the goods exposed to sale, or other goods of the person so refusing or neglecting.

Sect. 52. That the said new market should be appropriated to the sale of meat, fish, &c., and other marketable provisions (except corn, grain, &c.), and should be called the "New Market," and the present market, which was situated under the Guildhall, should be appropriated only to the sale of corn, grain, &c., and should be called the "Corn Market."

Sect. 53 empowered the mayor, aldermen, and burgesses to hold the markets on Wednesday and Saturday in every week throughout the year, and on and at such other days and hours of the day as might from time to time be appointed by the said mayor, aldermen, and burgesses.

Sect. 59. "That when the said new market-place for the sale of meat, fish, &c., and the new market for the sale of live cattle, &c., should be built, appropriated, and set apart, ready to be opened for public use, the said mayor, aldermen, and burgesses, or their successors, should, and they were thereby required, by a printed handbill or advertisement signed by the clerk for the time being acting in pursuance of the said Act, to be circulated in the said borough and the neighbourhood thereof, and by inserting the same in some news-
*54] paper circulated in the said county, to give ten *days' notice of such market-places, or either of them, having been so built, appropriated, and set apart, and ready to be opened for public use, previous to the day on which such market-places, or either of them, should be opened for public use; and from the same period the said market-place, or space under the Guildhall, should be appropriated for

the sale of corn, grain, flour, &c. : Provided always, that the tolls, rents, and stallages imposed by the said Act should not be paid or payable until the market-place in which the same should be authorized to be demanded should have been opened for public use as aforesaid.

Sect. 60. "That if any person should *on any market-day, or any other day*, after the said intended new market, and the necessary buildings and conveniences thereto, should have been erected, completed, and opened (and notice thereof should have been given as provided by the said Act), *sell or expose to sale*, at any time, *any corn, grain, flour, &c., within the said borough, in any place other than in that part of the existing market-place which is situate under the Guildhall*, or any meat, fish, &c., in any place within the said borough other than the said intended new market-place, every person so offending should, for every such offence, forfeit and pay any sum not exceeding 5*l.* : Provided, nevertheless, that nothing therein contained should extend, or be construed to extend, to prevent any persons from selling or exposing for sale any corn, grain, &c., or any meat, fish, &c., in their own dwelling-house, or in their own shop or premises, in any part of the said borough, in such manner as they might, at the date of the now reciting Act, lawfully do, or to restrain or prohibit any person from selling fish, vegetables, &c., from door to door within the said borough."

Sect. 73 made it lawful for any justice having jurisdiction, where any penalty was by that Act made recoverable before a justice of the peace, to proceed by summons, without *information in writing, and to hear and determine the matter of complaint, and on [*55 proof to convict, and adjudge payment of the penalty incurred, and proceed to recover the same.

It was proved at the trial, that for some time since the coming into operation of the said Act the market for corn, grain, &c., sold in bulk had been held in the market-place, under the Guildhall; and that on Saturday, the 12th March, 1859, William Edwards, a son of the defendant, and acting on his behalf, came to the house of Mr. Frederick Hodges, a grocer, of Brecon, occupying a house and shop in High Street, within the borough, near to the said market-place, in the same street as the present corn-market, and there sold, by sample, to Mr. Hodges, twenty sacks of oats, which oats, at the time of the contract, were not exposed for sale in bulk, but were brought into the town and delivered by the defendant to Mr. Hodges on the following Wednesday, which is also a market-day.

The said local Act was put in by the plaintiffs, and is to form part of this case.

The plaintiffs contended at the trial, and still contend, upon this evidence, that in selling the corn in the manner and under the circumstances above stated the defendant had infringed their right of market, and that he had no right to sell the corn, under the circumstances stated in the case, elsewhere than at the market-place under the Guildhall, or without paying to the plaintiffs the tolls which would have become due on such a sale. The defendant denied his liability, and objected that there was no proof of any notices or advertisements having been given or published under sect. 59 of the said Act, and

contended that there was no evidence of an infringement of right of market in respect of which he was or could be liable to the action.

The question for the opinion of the Court is, whether there was *56] evidence for the jury that the defendant had *infringed the plaintiff's right of market. If the Court should be of opinion in the affirmative thereof, then the verdict is to stand. If the Court should be of a contrary opinion, then a nonsuit is to be entered, the plaintiff's title to a market not to be disputed.

Giffard for plaintiffs.—The question is, whether a sale by sample within the borough, but without the limits of the market, is evidence of an infringement of the plaintiffs' right of market. A person who sells corn, by sample, in a market derives as much benefit from the market as if the corn was there in bulk; and if he refuses to pay toll, an action may be maintained against him for disturbance of the market: *The Bailiffs, &c., of Tewkesbury v. Bricknell*, 2 Taunt. 120. Here there was a sale by sample without the limits of the market, but if that was done for the purpose of evading payment of toll, it was a fraud on the owner of the market for which an action on the case will lie: *Blakey v. Dinsdale*, 2 Cowp. 661. Though the commodities are left beyond the limits of the market, if the seller derives a benefit from it, and refuses to pay toll, he is guilty of a disturbance of the market: *Bridgland v. Shapter*, 5 M. & W. 375.† [MARTIN, B.—It does not appear, from the facts stated, that the sale was made with the intention of evading the payment of toll. Suppose a person went to a friend's house adjoining a market, when it happened to be a market-day, and the latter said to him "I want to buy some oats," upon which he replied "I can sell you some, I have a sample in my pocket," and having exhibited it, a sale takes place, that would not be a disturbance of the market. POLLOCK, C. B.—There must be an intention to evade the payment of toll. Under the usury law, the mere taking more *57] than 5l. per cent. was not an offence *unless it was found to have been done usuriously.] That was the case of a public illegality, and therefore the "mala mens" must exist; here it is only necessary to show that the defendant deprived the plaintiffs of some profit of their market. In *Prince v. Lewis*, 5 B. & C. 363 (E. C. L. R. vol. 11), the defendant sold his vegetables in a street adjoining a market but without its limits, and it was assumed that he would have been liable to an action but for the fact that the owner had appropriated a portion of the market to other purposes than those specified in the grant, so that there was not room for the defendant within the market. [POLLOCK, C. B.—There the defendant placed his goods in the street for the purpose of selling them out of the market. WILDE, B.—In *Chitty on Pleading*, vol. 2, p. 626, 7th ed., the form of declaration for disturbance of a market contains this averment:—"Which otherwise would and of right ought to have been brought to the market of the plaintiff." In this case it is not so alleged, nor does it appear that this was anything more than a mere casual sale.] The defendant having sold the corn so near the market, the inference is that he intended to evade the payment of toll. It is like the case of a carrier, in which the non-delivery of goods is *prima facie* evidence of negligence. The limits of the franchise are shown by the 60th section, which imposes a penalty on any person who, on a market-

day or any other day, shall sell or expose to sale any corn, &c., within the borough, or in any other place than that part of the market situate under the Guildhall. [POLLOCK, C. B.—That must mean any public place.] The section preserves the rights of shopkeepers, which would be unnecessary if that were the construction. The owner of a market has by law a right to prevent persons from selling goods in their private houses situate within the limits of his franchise: *Mosley v. Walker*, 7 B. & C. 40 (E. C. L. R. vol. 14). [MARTIN, B.—That was *an ancient market, and there was evidence from which the jury found that the right existed. In *The Mayor, &c., of Mac-* [*58
clesfield v. Pedley, 4 B. & Adol. 397, 403 (E. C. L. R. vol. 24), Little-
dale, J., said that it has never been decided that the grantee of a
newly created market could bring an action for the disturbance of his
franchise against a person who did no more than sell in his own shop,
not within the limits of the market-place, marketable articles on the
market-days. BRAMWELL, B.—In *Roll. Abridg. Market (C.)*, *Fair*
pl. 1, it is said:—"If a man has a market in one part of the vill of
D., the inhabitants of the other part of the vill cannot erect new
houses and there in their houses and stalls sell merchandise; for this
is to the damage of the market: 2 E. 2, admitted."] As to the notice
required by the 59th section, that the new market has been opened,
the Act having passed in the year 1838, and the market having been
held in the appointed place ever since that time, the maxim "*Omnia*
presumuntur rite esse acta" applies.

Grove (*Garth* with him), for the defendant.—This action is not founded on any common law right to an ancient market, but the right alleged is that all persons selling corn on market-days within the borough, ought to sell the same within the market, or at their dwelling-houses, shops, or premises, and not elsewhere within the borough. That right can only be supported by the statute, the preamble(a) *of which shows that the market was formerly held in the [*59
public streets. [POLLOCK, C. B.—The 60th section uses the
words "sell or expose to sale"; therefore the selling must be the
result of an exposure to sale.] The statute was passed to remedy the
danger and inconvenience of holding the market in the public thorough-
fares; and by the 52d section a particular place is appropriated for it.
By section 42 toll is payable by every person "offering or *exposing to*
sale" any meat, corn, &c., "*brought into the said markets*, or either of
them," and there is a power of distress for enforcing payment. By
section 59 toll is not payable until the markets are open for public
use. Then, by section 60, if any person shall "*sell or expose to sale*,"

(a) The preamble of the Act is as follows;—

"Whereas the markets for supplying the inhabitants of the borough of Brecon, in the county of Brecon, and the neighbourhood thereof, with corn, grain, and agricultural produce, fish, poultry, and other provisions, and with live and dead stock, and certain other commodities, have been long held in the principal streets and other public thoroughfares within the said borough, whereby the same are obstructed, and rendered dangerous and inconvenient to the inhabitants and the public at large passing through the same: And whereas the market for buying and selling butcher's meat, and also cheese, butter, seeds, hops, and other things, hath been usually held in an enclosed space under the Guildhall of the said borough: And whereas the mayor, aldermen, and burgesses of the said borough are willing and desirous to erect a proper market-place and buildings for the sale of meat, fish, poultry, vegetables, garden seeds, fruit, cheese, butter, and other marketable provisions and commodities, with proper stalls, standings, and other accommodations therein."

any corn, &c., within the borough in any other place than that named, he shall forfeit for every such offence a sum not exceeding 5*l*. There is no evidence of any such offence; and before the statute it was no offence to sell in shops or in the public streets. The 60th section goes on to provide that nothing therein contained shall prevent any persons from selling corn in their dwelling-house, shop, and premises, in any part of the borough, in such manner as they might at the date of the Act lawfully do. If this sale is a disturbance of the market, any contract made by sample for the sale of corn coming from a foreign port would be equally so. Assuming that the plaintiffs have a right of action on the statute, to constitute a disturbance of the market the sale must be fraudulent and with the intention to evade the payment of *toll. The judgments of Lord Mansfield in *The Bailiffs &c. v. Tewkesbury*, 2 Taunt. 120, and of Lord Abinger in *Bridgland v. Shapter*, 5 M. & W. 375,† proceed on the ground that the sale was a fraud on the owner of the market. In *The Prior of Dunstable's Case*, 11 Hen. 6, p. 19, pl. 13, B., it was held that the allegation that meat was sold *occulte* was a material part of the declaration, and that the defendant's plea was defective in not traversing it. Here the declaration does not allege fraud, but simply a right to have commodities sold on market-days within the market, and in support of that right the plaintiff give in evidence the Act of Parliament. No case has decided that a sale by sample out of a market is an infringement of the right of market. If goods are fraudulently sold out of the market for the purpose of evading payment of toll, the proper remedy is by action on the case: *Blakey v. Dinsdale*, 2 Cowp. 661. In *Mosley v. Walker*, 7 B. & C. 40 (E. C. L. R. vol. 14), there was evidence of the exclusive right claimed by the owner of the market. This is an attempt to engraft ancient rights on a modern market, established for municipal purposes. The words, "expose to sale," in the 42d and 60th sections have reference to goods in bulk. [WILDE, B.—In *Mosley v. Walker*, which was an action for selling in a shop, the declaration uses the words "exposed to sale." By exposing to sale, a person gets the benefit of the concourse of people who frequent the market.—He also argued that the action would not lie, inasmuch as the statute which created the offence and imposed the penalty had provided a specific means of enforcing it. On this point he cited *Underhill v. Ellicombe*, McCl. & Y. 450,† *Stevens v. Jeacocke*, 11 Q. B. 731 (E. C. L. R. vol. 63), and the 73d section(α) of the 1 & 2 Vict. c. xii. He further argued that the action could not be maintained, since there was no proof of notice that the new market was opened, as required by the 59th section.

Giffard, in reply.—In *The Bailiffs, &c., of Tewkesbury v. Bricknell*, 2 Taunt. 120, no express fraud was alleged, but Lord Mansfield held that the fact of the sale was a fraud on the owner of the market. It is not necessary to aver that the goods would otherwise have been brought into the market, it is enough that they might have been. In *Yard v. Ford*, 2 Saund. 172, the fact that the new market might draw off customers from the old market, though held on a different day, was considered sufficient to justify the jury in finding it a nuisance. There is no authority for saying that the sale must be in a public place. In *Blakey v. Dinsdale*, 2 Cowp. 661, it was in a private room. The defend-

(α) *Ante*, p. 54.

ant *occulte* availed himself of the benefit of a market-day to obtain a customer.—He also argued that the action would lie, notwithstanding the statute which created the offence imposed a penalty: citing *Couch v. Steel*, 3 E. & B. 402 (E. C. L. R. vol. 77).

POLLOCK, C. B.—I am of opinion that the defendant is entitled to judgment. The case is, in this respect, defectively stated, and probably evidence might have been given to clear up the point. If the defendant's son, who acted for him, went to Brecon on a market-day with a view of selling the corn on behalf of his father, and intended to expose it for sale in the market, or anywhere near where he could obtain the benefit of the market, that would have been a case which, in point of law, would have entitled the plaintiff to a verdict. But I agree with Mr. *Grove* that no case has yet decided that a sale by sample out of a market *is an infringement of the right of market. Here the only facts are that the defendant's son went, [*62 on a market-day, to the shop of a person within the borough and near the market-place, and there sold him, by sample, some oats, which were delivered on the following market-day. That leaves the matter so uncertain that I think there is no evidence from which a jury ought to infer an infringement of the market.

I forbear saying anything on the other points, some of which involve considerable doubt, since it appears to me that the facts do not warrant a judgment for the plaintiffs; and, as they have not established their case in point of fact, the defendant is entitled to our judgment.

MARTIN, B.—I do not mean to dissent from the judgment of the Lord Chief Baron, and what I know is the opinion of my brothers Bramwell and Wilde, but I own that I entertain a strong impression that the facts are not stated as they existed, and that, if they had been, the plaintiffs would have been entitled to a verdict. In my opinion, the law is correctly laid down in *Bridgland v. Shapter*, 5 M. & W. 375,† where the defendant left his sheep on the premises of a public-house, in the immediate neighbourhood of a market, while he went into the market to find customers, whom he brought back to the public-house, and there sold them the sheep, and it was held that an action would lie against him; for he availed himself of the opportunity of a concourse of persons in the market to sell his cattle. I entirely concur with what was said by Lord Abinger in delivering judgment in that case.

I have no doubt the real facts of this case are, that the defendant, a farmer in the neighbourhood of Brecon, was in the habit of sending his corn for sale in the market at *Brecon; and if either he, [*63 or his son acting for him, went designedly there, that is, knowingly and intentionally, for the purpose of selling the corn in the market, or anywhere near, so as to obtain the benefit of the market without paying toll, that would be a disturbance of the market, for which the plaintiffs might maintain an action against him. The word "fraud," in its usual sense, is not applicable to this case. The right to hold a market is a right of property in the market, which the law protects. But the question here is whether, upon the facts now stated, there was evidence for the jury that the defendant had infringed the plaintiff's right of market, and in my opinion there was not; because I agree that if a person merely comes to a town to sell a commodity,

and it happens to be a market-day there, that would not be a disturbance of the market, because the act must be done designedly, and with an intention to obtain the benefit of the market without payment of toll.

BRAMWELL, B.—I am also of opinion that the defendant is entitled to judgment. With respect to the law, there ought not to be any doubt. The owner of a market has a right to toll; and consequently, if people bring their commodities to the market and avail themselves of it, they are subject to the toll, and the owner has his remedy for it as such. If, however, persons leave their commodities without the limits of the market, in order that they may not subject themselves to toll, but at the same time obtain the benefit of the market, that is a disturbance of it for which an action on the case will lie. Such is the principle of the decision in *Bridgland v. Shapter*, 5 M. & W. 375,† in which I entirely concur. Therefore, in this case, the plaintiffs ought to establish that they were entitled to a market, and that the *64] defendant disturbed it by taking the benefit of it without paying toll. Then is there any evidence of that? I think not. The defendant's son, acting for him, came to Brecon on a market-day, very likely intending to sell his oats in the market, if he could not find a customer in the town. Although he came on a market-day, the sale had no more to do with the market than if a person, invited to stop at the house of a friend, in the course of conversation mentioned that he had some oats to sell, and thereupon a sale of them took place at the friend's house on a market-day. No doubt, if the defendant's son had met the purchaser in the market, and had said to him, "We had better go to your shop, and make the bargain there, otherwise I shall be liable to toll," a jury would have been warranted in finding that to be a disturbance, inasmuch as he took the benefit of the market without paying for it. So if he had said, "Let us go to a public-house, and settle the business there," the same observation would apply. But I think upon the case, as here stated, that all the defendant's son did was *bonâ fide*. He goes to a person in his shop (either because he intended to go there first, or because he had tried to find a customer in the market and had failed) and sells his oats in the shop. I cannot think that is a disturbance of the market. The principle may be tested by an extreme case. Suppose a commercial traveller from London, who had no knowledge of the market, happened to come on a market-day to Brecon for the purpose of calling on a customer, and on going into the market found him there and sold him some goods: why should the owner of the market have a right of action for a disturbance of it? The seller has derived no benefit from the existence of the market. Ought he to say to the customer, "Step out of the market, because if I sell you the goods here I shall be *65] subject to toll." That seems to me **absurd*. If that be so in the case of a commercial traveller coming from London, it would be equally true of a farmer coming from the neighbouring country. In this case, it seems to me that there is no evidence that the defendant got the benefit of the market and no evidence of a disturbance by selling in the market. If, indeed, it had appeared that the defendant had in any way got the benefit of the market, I should have been of a different opinion; but, upon the facts stated I

see no reason for coming to any other conclusion than that the defendant is entitled to judgment.

WILDE, B.—I am of the same opinion. The plaintiffs rest their claim upon a right of market, and the common law right which belongs to the owner of a market. The right, as stated in the declaration, is, that persons selling corn and grain on a market-day within the borough "ought to sell the same within the market or at their own respective dwelling-houses, shops, or premises, and not elsewhere within the borough;" and that right is traversed by a plea. There is no evidence of immemorial or prescriptive right to this market; but it is agreed that the right to some market shall not be disputed. The plaintiffs gave no evidence in support of this right but a local Act of Parliament, and they ask us to infer from that a right to the claim set up in the declaration. I should have thought there was great difficulty in coming to that conclusion. I gather from the Act of Parliament that the plaintiffs have some right of market, but whether or no they have the right claimed in the declaration does not appear by the Act. However, upon that point I give no opinion, because I am in favour of the defendant upon the question whether he has infringed the right, assuming it exists.

*Now, the action is for a disturbance of market; and whether or no there has been a disturbance is not a question of fact. It is perhaps difficult to lay down an absolute definition of what constitutes a disturbance of a market; though it is equally easy to suggest cases that would or would not be; but, in order to warrant a jury finding a disturbance, it must be shown that the defendant has taken the benefit of the market, or at least has deprived the owner of some profit which he would otherwise have obtained. [*66]

Then the question is, whether the facts of this case afford evidence for a jury of a disturbance. The only facts are that two persons, of whom the defendant's son was one, were in a house in Brecon on a market-day, when they struck a bargain for the sale of a quantity of corn by sample. It seems to me that is not a disturbance, unless every contract made within the borough, no matter how or under what circumstances, is a disturbance. What other facts may exist which might show a disturbance, I do not surmise. Dealing with the facts before the Court, I think there is no evidence for the jury of a disturbance.

I may add that this is a deviation from the usual practice, and one which may be found inconvenient, viz., instead of moving the Court upon the question whether there was evidence for the jury, turning it into a special case. I never knew another instance of a special case being stated, in which the only question was whether there was any evidence for a jury.

Judgment for the defendant.

*67]

*HOLLAND v. COLE. May 13.

A lessee, who covenanted not to assign the demised premises without the consent in writing of the lessor, executed a deed, under the 192d section of the Bankruptcy Act, 1861, whereby he assigned all his property to trustees for the benefit of his creditors.—Held, that the assignment was a forfeiture of the lease.

EJECTMENT to recover possession of a house and premises in Oxford Street, in the county of Middlesex.

At the trial, before Martin, B., at the Middlesex Sittings in the present Term, it appeared that by indenture of the 29th November, 1858, the plaintiff demised the house and premises in question to one Clark for a term of twenty-one years. The indenture contained a covenant by Clark that he would "not assign or underlet, or otherwise part with possession of the said demised premises, or any part thereof, without the consent in writing of the said W. Holland (the plaintiff), his executors, &c., for that purpose, under his or their hand or hands first had and obtained." There was the usual clause of re-entry, in case of breach of any of the covenants in the lease. By indenture of the 9th January, 1862, between Clark of the first part, J. Troup and J. Hazlett, trustees, for themselves and the rest of the creditors of Clark parties thereto of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of Clark, of the third part; after reciting that Clark was indebted to the parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereunder written, which he was unable to pay in full, and he had therefore proposed and agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors: It was witnessed that Clark, for a nominal consideration, did bargain, sell, assign, &c., to the said trustees, their executors, &c. (inter alia), all that the lease of the house and premises in Oxford *68] Street, &c. This deed was duly registered pursuant to the provisions of the 197th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). The trustees entered into possession of the house and underlet it to the defendant. The consent of the plaintiff to the assignment of the lease had not been obtained, and he brought the present action for the breach of the covenant.

It was submitted, on behalf of the defendant, that there was no breach of the covenant not to assign, inasmuch as, under the Bankruptcy Act, 1861, the trustees of Clark were in the same position as assignees in bankruptcy. The learned Judge was of opinion that the assignment was a forfeiture of the lease, and directed a verdict for the plaintiff.

J. B. Karlake now moved for a new trial, on the ground of misdirection.—The indenture of assignment, when registered, vested the debtor's property in the trustees, in the same manner that it would have vested in assignees under a bankruptcy. The sections of the Bankruptcy Act, 1861, which relate to this subject, commence with the 192d, and are headed: "As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor." The 192d section renders certain deeds entered into between a debtor and

his creditors, or a trustee on their behalf, valid and binding on all the creditors, provided certain conditions be observed. The 194th section requires the deed to be registered in the Court of Bankruptcy within twenty-eight days after its execution; and, by the 196th section, a memorandum of registration must be written on the face of the deed. By the 197th section, after registration of such deed, the parties thereto, or bound thereby, shall, in all matters relating to the estate and effects of the debtor, "have the benefit of and be liable to all the provisions of this Act, in the same manner as if the debtor had *been [*69 adjudged a bankrupt, &c., and the trustees had been appointed [*69 creditors' assignees under such bankruptcy," &c.; "and the trustees of any such deed, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, &c., as are now possessed or may be used or exercised by assignees, &c., with respect to the bankrupt, or his net estate and effects in bankruptcy." The 198th section shows that this proceeding is in effect a bankruptcy, for it provides that, after notice of the filing and registration of the deed, no process shall be available against the property or person of the debtor. [POLLOCK, C. B.—In this case there is an assignment of the lease by the debtor, with a view to proceedings which may or may not take effect; in the case of bankruptcy there is no assignment by the bankrupt.] Formerly a conveyance by a trader of all his property to trustees for the benefit of his creditors, was an act of bankruptcy and void, and therefore, if a lease was included in the conveyance, there was no valid assignment of it so as to create a forfeiture: *Doe v. Lloyd v. Powell*, 5 B. & C. 308 (E. C. L. R. vol. 11). Now, validity is given to trust deeds for the benefit of creditors, and the trustees are placed in the same position as assignees under a bankruptcy. [CHANNELL, B.—The title of the trustees is founded on the deed itself.] The deed could have no effect as regards the rights of the trustees against third persons, except by force of the statute. [MARTIN, B.—In the case of bankruptcy the assignees take by operation of law, and therefore there is no breach of the covenant not to assign. Here there is an actual assignment of the lease by the debtor, and the lessor has elected to determine it.] At the time the assignment was executed, it was uncertain whether *it would have any effect, but as soon as the requisites of the statute were complied with, it [*70 ceased to be a voluntary conveyance, and became an assignment in bankruptcy. This is only a voluntary mode of becoming bankrupt, and the same rights exist against third persons as in the case of a hostile bankruptcy. The legislature could never have intended that the assignment should operate as a forfeiture of the lease; for in that case the object of the trust deed would be defeated.

POLLOCK, C. B.—I am of opinion that there ought to be no rule. It may be that, if it had occurred to the legislature, some provision would have been inserted in the Act, to the effect that an assignment for the benefit of creditors should, when registered, be considered as an act of bankruptcy; but, instead of such an assignment being declared void, it is the very foundation of the title of the trustees. That being so, the assignment is not by operation of law, but by the act

of the trader; and the forfeiture takes place the moment the deed is signed and sealed by him.

BRAMWELL, B.—I am of the same opinion. It has been argued that it never could have been intended by the legislature that an assignment of a lease for the benefit of creditors should operate as a forfeiture of it, because that would defeat the very object of the assignment. But the answer has been given by my Lord,—if the case had been contemplated most likely some provision would have been inserted in the Act to meet it. If the words of the Act be looked at, there is no ground for Mr. *Karslake's* construction of it. The sections in question are headed: "As to trust deeds for benefit of creditors, composition and inspectorship deeds, *executed by a debtor.*" The 192d section renders such deeds binding, provided certain conditions *71] be observed; one of which is that the deed is executed by three-fourths in value of the creditors, whose debts amount to 10*l.* or upwards. But the only consequence of the requisite number of creditors not executing the deed is that it is not binding upon those who have not executed it. The 194th section requires the deed to be registered. The 197th provides that, after registration, the parties to the deed, or bound thereby, shall, in all matters relating to the estate and effects of the debtor, have the benefit of and be liable to all the provisions of the Act, in the same manner as if the debtor had been adjudged bankrupt, and the trustees had been appointed creditors' assignees under such bankruptcy. It does not make the debtor a bankrupt, but merely says that the trustees under the deed shall, in all matters relating to the debtor's estate, have the same powers as the creditors' assignees in bankruptcy. Therefore the title of the trustees is under the deed, not under the Act, which only provides in what way the deed shall be carried into execution. If the requisite number of creditors do not assent to the deed, it is manifest that the case is not within the Act; if they do, the operation of the deed depends upon itself, not upon the Act.

CHANNELL, B.—I am of the same opinion, and for the same reasons.

MARTIN, B.—A man makes a bargain that he will not assign his lease, and that if he does it shall be forfeited. He then assigns all his property to trustees: I cannot comprehend why that is not a forfeiture of the lease. If the Act said that notwithstanding the breach of such a condition a lease shall not be forfeited, the case would be different, but there is nothing of the kind in the Act.

Rule refused

*72]

*TREDWEN *v.* HOLMAN. May 5.

A policy of assurance, in a Mutual Marine Insurance Association, was subject to the following rule:—"All average claims and claims of abandonment shall be adjusted and settled, conformably to the custom of Lloyd's or the Royal Exchange, by a professional average-stater. But should the committee or the assured be dissatisfied with the adjustment, they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of such two persons shall be final; and all other cases of dispute, of whatever nature, shall be referred in like manner; but the committee or assured by mutual consent may refer all such adjustments or disputes to one person only,

whose award shall also be final; and no action at law shall be brought until the arbitrators have given their decision."—Held, that no action could be maintained on the policy for a total loss until the claim had been adjusted and settled by arbitration in pursuance of the rule.

In an action for a total loss the declaration set out the policy and the above rule, and averred that the plaintiff had always been willing that the loss and amount payable in respect thereof should be adjusted and settled according to the rule, and that he had performed all conditions precedent necessary to entitle him to maintain the action. It then alleged, as breaches, that the defendant would not settle or adjust, or allow to be settled or adjusted, the amount payable on the loss, in accordance with the policy and rules, and that the amount insured had not been paid. The defendant demurred to the declaration and also pleaded a plea which in terms traversed the breaches.—Held, that the declaration was good on demurrer, since it must be deemed to be averred either that the defendant had refused to refer, or that a reference had been had and an award made in favour of the plaintiff, as for a total loss; but that the plea, being proved, was an answer to it.

DECLARATION.—For that the plaintiff, before and at the time of making the policy of assurance hereinafter next mentioned, to wit, on the 11th day of April, 1860, and thenceforth continually until the 5th day of March, 1861, was a shipowner and member, together with the defendant and divers other persons, of a certain society or association hereinafter mentioned, called "The Great Western Mutual Marine Insurance Association," and the ship or vessel hereinafter mentioned was from the day of the date and making of the said policy of assurance admitted into and entered in the said Society, and continued in the said Society until the loss thereof hereinafter mentioned. And the plaintiff, on the 12th of April, 1860, caused to be made a certain policy of assurance purporting thereby and containing therein, that the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did appertain, in part or in all, did make assurance and cause himself and them, and every of them, to be insured, lost or not lost, at and from the 11th of April, 1860, until the 20th of March, 1861, upon any kind of goods and merchandise, and also upon the body, tackle, &c., of and in the good ship or vessel called the "Aurora." And the said ship, &c., and goods and merchandise, &c., for so much as concerned the assured, by agreement between the assured and assurers in the said policy, was thereby valued at 3860*l.*, and insured from perils of the seas. And it was thereby further agreed by and between the plaintiff and the defendant that the said policy should be subject to certain rules thereunto annexed which, so far as they are material to this action, are to the tenor and effect and in the words and figures following:—

1. That the affairs of this association shall be managed by a committee of seven persons chosen by and from the members, three to be a quorum, who shall meet once a quarter, or oftener if required, and order payment by the managers' draft at two months' date; and that the members of this association severally and respectively, and not jointly or in partnership, nor the one for the other of them, but each of them in his own name, shall insure each others' ships or shares of ships, from noon of the day of entry of each ship until noon of the 20th of March following, against losses, perils, and damages which may be sustained or received by their respective ships, or caused or done by them to other ships, except when on the voyages in the trades or under the circumstances hereinbefore particularly excepted.

3. That all average claims and claims of abandonment shall be

adjusted and settled, conformably to the custom of Lloyd's or the Royal Exchange, by a professional average-stater (except as otherwise directed by these rules). But should the committee or the assured be dissatisfied with the adjustment they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of *74] such three persons shall be final; and all other *cases of dispute, of whatever nature, shall be referred in like manner; but the committee and assured by mutual consent may refer all such adjustments or disputes to one person only, whose award shall also be final; and no action at law shall be brought until the arbitrators have given their decision.

11. That all losses by stranding or otherwise shall without delay be made known to the managers, and all protests, vouchers, surveys, and average statements shall be sent to the managers, and laid before the committee, and be subject to the stipulations named in the rules of this association; and all ships lost or damaged, or doing damage to other ships, shall contribute to their own loss or damage, and no claim shall be admitted with any ship sold with her average without the approval of the committee; and in the event of any ship being stranded or damaged and not taken into a place of safety, it shall be lawful for this Society to use every possible means in their power to procure the safety of the ship, the owner bearing his proportion of the expenses incurred, and any owner refusing the co-operation of the agents of the association for the safety of a ship on the strand shall suffer a deduction of 50% per cent. in the settlement of the claim: and it is hereby provided that no acts of the association or its agents under or in pursuance of the powers hereby reserved to the Society shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to the association; and this Society under any circumstances shall only pay for the absolute damage caused by the dangers and accidents of the sea.

12. That all drafts for claims shall be duly accepted and punctually paid when due; and if any member shall neglect or refuse to accept or pay his contribution on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in or by *75] this association, *but he shall still be liable to contribute to all losses which may occur during the continuance of the policy; that the solicitors for the association shall be directed to sue immediately for the amount due, and if not recovered through the insolvency of the member, the loss shall be borne by the members generally.

Averments.—That the said association mentioned in the said rules was and is "The Great Western Mutual Marine Insurance Association," and that the said policy of assurance was made by the plaintiff for and on the part and behalf of himself and of G. Hellyar, &c.; and that the said writing or policy of assurance was subscribed with the name of the defendant and divers other persons by an agent of the defendant, and the said several persons in that behalf, as assurers for the sum of 1500% upon the premises in the policy of assurance mentioned. And the plaintiff undertook and promised the defendant to perform and fulfil all things in the said policy of assurance, rules, and

regulations contained on his part and behalf to be done, performed, and fulfilled. And the defendant undertook and promised that he would become and be an insurer to the plaintiff for his part and proportion of the said last-mentioned sum of and upon the said ship or vessel upon the terms and according to the said policy of assurance and the said rules and regulations, and would perform and fulfil all things in the policy of assurance, rules, and regulations contained on his part and behalf to be performed and fulfilled. And the plaintiff and the said other persons on whose behalf the said insurance was made as aforesaid, or some of them, were then and thence until and at the time of the loss hereinafter mentioned, interested in the said ship and premises to the amount of all the moneys by him insured thereon. And the plaintiff says that after the making of the said policy of assurance and during the continuance thereof, and of the *risk against which the said ship was covered and protected [*76 by the said policy, the said ship was by the perils of the sea wholly wrecked and lost. And the plaintiff has always been willing that such loss, and the amounts payable in respect thereof, should be adjusted and settled according to the rules of the said association, whereof the defendant has always had notice.—Breaches: although all conditions have been performed and fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement in the said policy and the said rules contained, and to maintain this action for the breach thereof hereinafter alleged, and although the plaintiff has requested the defendant and the members of the said association to settle and adjust, or to allow to be settled and adjusted, the amount payable in respect of the said loss of the plaintiff, and in accordance with the terms of the said policy and the said rules in that behalf, yet the defendant and the said members of the said association have wholly refused so to do, and the said amount insured has not, nor has any part thereof, been paid to the plaintiff; nor has the same been settled or adjusted in accordance with the said policy and rules.—There was a second count on a similar policy in "The Metalled Freight Association," and subject to rules in the same terms as above.

Pleas (inter alia).—Fifthly, to first count: That the plaintiff was not ready and willing to have the loss and amounts payable in respect thereof adjusted and settled according to the rules of the said association.

Sixth, to first count.—That the defendant had not notice that the plaintiff was ready and willing to have the loss and amount payable in respect thereof adjusted and settled according to the rules of the said association.

Seventh, to first count.—That the plaintiff did not request *the defendant and the members of the said association to settle and adjust, or to allow to be settled and adjusted, the amount payable in respect of the said loss of the plaintiff, in accordance with the terms of the said policy, and the said rules in that behalf as alleged. [*77

Eighth, to first count.—That the defendant and the said members of the said association did not refuse to settle and adjust the said claim as alleged, and were always ready and willing to settle and adjust it.

Ninth, to so much of the first count as alleged that the amount of the sum insured has not, nor has any part thereof, been paid.—That the plaintiff's claim in respect thereof was a claim, to wit, a claim of abandonment within the meaning of the said third of the rules in that count mentioned, and that the said claim has not been adjusted and settled according to the said rule in that behalf; and that there was a dispute by and between the plaintiff and the said association and the committee thereof, in respect of the said claim, within the meaning of the said rule, and that it has not been arbitrated upon as provided for in this rule, nor have nor has such arbitrators or arbitrator as therein mentioned given a decision thereupon, or in respect thereof.—The fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth were pleas to the second count, similar to the above pleas.

The defendant also demurred to the declaration.

The plaintiff took issue on the pleas, and also demurred to the ninth and nineteenth pleas.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, the following facts appeared:—The plaintiff was part owner of a ship called the "*Aurora*," and he had effected an insurance upon the ship and freight in "The Great Western Mutual Marine Assurance Association," of which the plaintiff and defendant were members.

*78] The policy was subject to the rules mentioned in the declaration. The ship sailed from Venice with a cargo of wheat, and was lost in the Adriatic Sea. The plaintiff sent to the association a claim for a total loss; and subsequently forwarded vouchers and documents relating to it, together with the average calculations of an average-taker. The committee of the association refused to entertain the claim on the ground that the captain's certificate was not in conformity with "The Merchant Shipping Act, 1854," and had been improperly obtained. Some correspondence took place between the plaintiff and defendant, in which the defendant expressed his willingness to refer this claim in manner provided by the third rule; but the plaintiff refused to do so. The plaintiff had also effected another policy in the association mentioned in the second count, and which was subject to similar rules. A verdict was entered by consent for the defendant on the above pleas, leave being reserved to the plaintiff to move to enter the verdict for him.

Montague Smith, in the following Term, obtained a rule nisi accordingly, on the ground that upon the evidence the plaintiff was entitled to the verdict.

Honeyman showed cause, and also argued in support of the demurrer to the declaration, and in support of the ninth and nineteenth pleas (May 2).—No action is maintainable on this policy until the claim has been adjusted and settled by an arbitration in pursuance of the third rule. [WILDE, B., referred to *Horton v. Sayer*, 4 H. & N. 643†.] There the agreement was that all matters in difference should be determined by arbitrators, and that the parties should not prosecute any action at law or in equity without first submitting to such arbitration; and that was held an absolute agreement to oust the superior Courts of their jurisdiction, *and therefore void. This case resembles *Scott v. Avery*, 5 H. L. 811, where it was provided that no action at law or in equity should be maintained on the

policy until the matters in dispute had been decided by arbitrators, and then only for such sum as the arbitrators should award. *Horton v. Sayer* and *Scott v. Avery* have established this distinction: that a mere agreement to refer the matter in dispute to arbitration will not oust the superior Courts of their jurisdiction; but when the agreement is that no action shall be maintained until the amount in dispute has been ascertained by an arbitrator, that is binding on the parties. [BRAMWELL, B.—If a tenant covenants that he will cultivate the demised land in a husbandlike manner, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them.] A claim for a total loss is a claim which must be adjusted and settled in the manner prescribed by the third rule; for it provides that every dispute of whatever nature shall be referred to arbitration, and that no action at law shall be brought until the arbitrators have given their decision. The language which the parties have used renders the adjudication of the arbitrators a condition precedent to the right of action: *Hotham v. The East India Company*, 1 T. R. 638; *Braunstein v. The Accidental Death Insurance Company*, 1 B. & S. 782 (E. C. L. R. vol. 101); and *Stavers v. Curling*, 3 Bing. N. C. 355 (E. C. L. R. vol. 32). If the declaration means that the defendant has refused to have the claim adjusted and settled by arbitration, that is denied by the eighth plea, and the issue found for the defendant.

Montague Smith and Garth, in support of the rule, and *also [*80 in support of the declaration and demurrer to the ninth and nineteenth pleas.—The action is maintainable. First, the case is not within the principle laid down in *Scott v. Avery*, but is governed by *Horton v. Sayers*. The third rule commences by providing for the cases of average claims and claims of abandonment. This is a claim for a total loss, and therefore not within that branch of the rule. The rule then provides that "all other cases of dispute, of whatever nature, shall be referred in like manner." That is an absolute agreement to refer all disputes to arbitration, and therefore void, as ousting the Courts of their jurisdiction.

Secondly, assuming that the agreement to refer is valid and applies to this case, the declaration is good. It avers that the plaintiff has always been willing that the loss should be adjusted and settled according to the rules of the association, and it is alleged as a breach that the defendant would not settle and adjust, or allow to be settled and adjusted, the amount payable in respect of the said loss of the plaintiff, and in accordance with the terms of the policy and the rules in that behalf. [BRAMWELL, B.—It is not alleged that the defendant refused to refer.] There is a general averment of the performance of all conditions necessary to entitle the plaintiff to maintain the action; and therefore it must be taken either that the defendant has refused to refer or that there has been a reference and award, and that the defendant has refused to pay the sum awarded.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN. B.—We are of opinion the defendant is entitled to

judgment. The case of *Scott v. Avery*, 5 H. L. 811, decided that
*81] *the insurer and the underwriter may contract that no right
of action (to be enforced in a Court of law) shall accrue until
an arbitrator has decided, not merely as to the amount of damages to
be recovered but upon any dispute that may arise upon the policy.
The question therefore is one of construction, and we think the parties
to this policy have so agreed. The third rule, which is incorporated
with the policy, after providing for disputes as to average
claims and claims of abandonment, expressly declares *that all other
cases of dispute, of whatever nature, shall be referred; and no action at law
shall be brought until the arbitrators have given their decision.* The
agreement is clear and unambiguous, and the parties probably meant
to act upon *Scott v. Avery* and exclude the jurisdiction of the Courts
of law, except for the purpose of enforcing the award to be made by
the arbitrators. A case of *Horton v. Sayers*, 4 H. & N. 623,† was cited
and relied on by the plaintiff. But we are of opinion that this case is
governed by the case of *Scott v. Avery*, and not by that of *Horton v.*
Sayers. The plaintiff is therefore in the wrong. The defendant pro-
posed to him to refer the matter in dispute, in accordance with the
third rule, to which he refused to accede, and he has failed to perform
that which is a condition precedent to his maintaining the present
action.

As to the entries to be made upon the record, there are two counts
in the declaration upon two valued policies on the ship "Aurora" in
two Societies of which the defendant is a member. The counts are
similar. They begin by setting out the policies, including the third
rule; they then aver the total loss of the ship, and aver the perform-
ance of all conditions precedent, generally, in compliance with the
Common Law Procedure Act, 1852, s. 57. It was argued on behalf
*82] of the plaintiff that, assuming the third rule to create *a con-
dition precedent, it must be deemed to be averred that the
plaintiff had proposed to refer the dispute, or that a reference had
been had and an award made in favour of the plaintiff, as for a total
loss. This seems to be so. And it was then further argued that the
breaches ought to be read as alleging that the defendant had not per-
formed what he had contracted to do upon such conditions happening,
viz., concur in a reference and pay the amount of loss awarded to be
paid. The breaches, as alleged, are that the defendant would not
settle or adjust, or allow to be settled or adjusted, the amount payable
on the loss, in accordance with the policies and rules, and that the
amount insured had not been paid. Now, assuming that the con-
struction contended for may be put upon the breaches the counts are
good, but then the defendant is entitled to the verdict upon the eighth
and seventeenth pleas, which traverse them. He never refused to go
into a reference; on the contrary, he proposed one which the plaintiff
rejected; and he never refused to pay an amount awarded, for no
award was ever made. He is therefore entitled to have the verdict
entered for him upon two material issues, which entitles him to judg-
ment in the action.

As to the other issues in fact, they are only material as regards
costs, and possibly the parties may arrange as to them, either by
agreeing to an entry that the jury be discharged, or settling between

themselves how the verdict is to be entered. If this cannot be done, they can be settled by a Judge at Chambers.

As to the demurrers to the ninth and nineteenth pleas, they are founded upon the assumption that the third rule creates a condition precedent. We think it does, and that the pleas are good.

The result is, that our judgment is for the plaintiff upon the demurrer to the declaration, for the defendant upon the *demurrer [83 to the ninth and nineteenth pleas, and that the rule to enter the verdict for the plaintiff upon the eighth and seventeenth pleas, which traverse the breaches, be discharged. Judgment accordingly.

WATTS v. AINSWORTH and Others. April 25.

The plaintiff wrote to the defendants, offering to sell them seed of growing turnips, to which the defendants replied asking what turnips he had in growth, their quantities and prices. The plaintiff answered that all that he could offer them at present was the produce of five acres of White Globe seed at 18s. per bushel. The defendants offered to take two or three acres at 16s. 6d. per bushel. The plaintiff replied that he could not accept less than 18s. The defendants then wrote to him as follows:—"In reply to your favour of this morning we beg to say as our neighbours are giving you 18s. per bushel for White Globe turnips, we, as a beginning with you, will take the produce of three acres at that price, to be delivered as soon as harvested, 1861, free of carriage to London Station. Let us know what other sorts, &c., you may have to offer, and also Wurzell seeds of sorts for 1861 harvest. Waiting your reply,—We remain," &c. The plaintiff wrote no answer to this letter; but subsequently saw one of the defendants at their warehouse, on which occasion it was found by the jury that the plaintiff verbally assented to the terms contained in that letter.

Held, that there was a sufficient memorandum or note in writing of the contract within the 17th section of the Statute of Frauds.

THE declaration stated, that the plaintiff agreed with the defendants to sell, and sold to the defendants, and the defendants then agreed with the plaintiff to buy, and bought of the plaintiff, the produce of three acres of White Globe turnip seed of the growth of the year 1861, at the price of 18s. per bushel, to be paid by the defendants to the plaintiff; and upon the terms that the plaintiff should deliver the said White Globe turnip seed as soon as harvested in the year 1861, free of carriage, to the Bricklayers' Arms Station, London, of the South Eastern Railway; for the defendants, and that the same seed should be accepted by the defendants at that station.—Averment: that the plaintiff has done all things necessary on his part, &c., to entitle the plaintiff to have the said White Globe turnip seed accepted and paid for by the defendants, according to the said contract.—Breach: that they did not nor would accept the said White Globe turnip seed or pay the plaintiff the said price *for the same, but have wholly [84 neglected and refused so to do, &c.

Plea.—That the defendants did not promise as alleged.—Issue thereon.

At the trial, before Wightman, J., at the last Kent Assizes, the following facts appeared.—The plaintiff was a farmer at Hythe, in the county of Kent, and the defendants were seed merchants in London, carrying on their business under the style of "James Carter & Co." In March, 1861, the plaintiff having grown some White Globe turnip seed, wrote to the defendants as follows:—

"Gentlemen,

"Hythe, 7 March, 1861.

"Mr. Baydon of this place has handed me your card, stating that you were buyers of turnip seeds now growing. I do a large business with several of the most respectable houses in London and elsewhere, and possibly I may be in a position to offer you some sorts that you may be buyers of. If you will have the goodness to name the sorts and quantities, I will at once say how far I can meet your wishes. My usual practice is to contract by the acre, the seedsman taking whatever the produce may be at a stated price per bushel.

"I am, &c.

"JAMES WATTS."

The defendants wrote in reply as follows:—

"James Watts, Esq.

"London, March 11, 1861.

"Dear Sir.—In reply to yours we beg to say we shall be glad to know what turnips, &c., you have in growth for 1861 harvest, with quantities and price, delivered carriage free to London Station. We should also be glad to know at what price you could do us four or six acres Scimitar Peas, if you have them in growth.

"We remain, &c.

"JAS. CARTER & Co."

To which plaintiff replied as follows:—

*85] *"Messrs. Carter & Co. "Hythe, 14 March, 1861.
 "Gentlemen.—Since writing to you on the 7th inst., I have gone over my growing crops, and I find I do not stand very well for surplus, and all I can offer you at the present moment, is the produce of five acres White Globe, @ 18/6, five ditto Skirving's Swedes, @ 28/. Some of the latter was sold @ 30/ a few days since. You may entirely rely on the stocks of the above, and I will undertake to deliver them to the Bricklayers' Arms Station. I cannot offer you any Scimitar Peas. I have only six bushels left, barely sufficient to get up my stock. Your early reply will oblige,

"Yours, &c.,

"Messrs. Carter & Co."

"JAS. CARTER & Co."

The defendants then wrote to the plaintiff as follows:—

"James Watts, Esq.

"London, March 18, 1861.

"Dear Sir.—In reply to your favour we beg to say we have bought Skirving's Swede Turnips at a considerable less price than what you quote it at. We also think your price too high for White Globe. We could take two or three acres of the latter at 18/6 per bushel, just to make a beginning with you. Waiting your reply,

"We remain, &c.,

"JAS. CARTER & Co."

The plaintiff replied as follows:—

"Gentlemen,

"Hythe, 19 March, 1861.

"I am much obliged for your offer for two or three acres of White Globe, but I cannot accept it. My contract price was 18/ with the London Houses, and I see no reason to go below that now. I was asked 35/ for growing Swedes to-day at Ashford market. I cannot offer you any peas.

"I am, &c.

"Messrs. Jas. Carter & Co."

"JAMES WATTS."

The defendants wrote in reply as follows:—

*" James Watts, Esq.

" London, March 21, 1861.

" Dear Sir.—In reply to your favour of this morning we
beg to say, as our neighbours are giving you 18/ per bushel for White
Globe Turnips, we, as a beginning with you, will take the produce of
three acres at that price, to be delivered as soon as harvested 1861,
free of carriage to London Station. Let us know what other sorts
you may have to offer, as also Wurzell Seed of sorts for 1861 harvest.
Waiting your reply,

" We remain, &c.

" JAS. CARTER & Co."

The plaintiff wrote no answer to that letter, but on the 25th March called at the defendants' warehouse in London and had some conversation with Ainsworth, one of the defendants, about the purchase of some other seeds, when he said, "I think we have some transaction with you," to which the plaintiff replied, "Yes, a contract for three acres of White Globes." The defendant Ainsworth, however, stated that the plaintiff, when he called at their warehouse, refused to sell them the seed upon the terms they had offered, and that in consequence the defendants bought the seed elsewhere.

It was objected, on behalf of the defendants, that there was no note or memorandum in writing of the contract to satisfy the 17th section of the Statute of Frauds. The learned Judge left it to the jury to say whether the plaintiff, when he called at the defendants' warehouse, accepted or repudiated the offer contained in the letter of the 21st March. The jury found that he accepted it, and returned a verdict for the plaintiff for 79*l.* 4*s.*, leave being reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion that there was no valid contract within the 17th section of the Statute of Frauds.

Prentice now moved for a rule nisi accordingly.—There was no memorandum or note in writing of the bargain to satisfy the 17th section of the Statute of Frauds. The letters are mere proposals. Prior to the letter of the 21st of March there is no foundation for saying that there is anything to bind either party. By that letter the defendants offer to take the produce of three acres of White Globe turnip seed at 18*s.* a bushel, but the plaintiff never accepted the offer. It is evident that the defendants considered it a mere proposal, for they add: "Waiting your reply." Suppose that letter did not relate to the sale of goods, would it require a stamp as a binding contract? [BRAMWELL, B.—Suppose the plaintiff had refused to deliver the seed, could an action have been maintained against him?] It could not, for he never assented to the defendants' offer to take the produce of three acres. The plaintiff offered to sell them the produce of five acres, and was not bound by any offer of the defendants to take a less quantity. The parol assent of the plaintiff, which the jury have found, is not sufficient to satisfy the statute.

MARTIN, B.—I am of opinion that there ought to be no rule. It seems to me that the requirements of the statute are satisfied in two ways. I think the letter from the defendants of the 21st March amounted not merely to a proposal to take the produce of three acres of turnip seed at 18*s.* per bushel, but that it was a contract in writing properly so called. But, assuming that it is not so, the finding of the jury makes it a good memorandum of the bargain. After that letter was written, the plaintiff saw the defendants and agreed to the terms

contained in it. Thereupon it became a sufficient note in writing to satisfy that part of the 17th section of the Statute of Frauds which requires that some note or memorandum in writing of the bargain *88] *be made and signed by *the parties to be charged* by such contract: *Smith v. Neale*, 2 C. B. N. S. 67 (E. C. L. R. vol. 89).

BRANWELL, B.—I also think there ought to be no rule. It seems to me that there is a sufficient memorandum in writing within the 17th section of the Statute of Frauds. No doubt there is difficulty in all cases where the Court is called upon to put a construction upon a document with no authority to guide it in ascertaining the true meaning. But here I can see a note or memorandum in writing of the bargain. First, there is the letter of the 7th March in which the plaintiff states that he has been told that the defendants were buyers of turnip seeds then growing; and that possibly he might be in a position to offer them some sorts which they might buy; and that, if they would name the sorts and quantities, he would at once say how far he could meet their wishes. Thereupon the defendants wrote in reply, "We shall be glad to know what turnips, &c., you have on growth for 1861 harvest, quantities and price, delivered carriage free to London Station." The plaintiff says in answer, "All I can offer you at the present moment is the produce of five acres Globe 18s. 6d., five ditto Skirving's Swedes 28s." The defendants thereupon, in effect, say,— "We do not want all your produce: we want only two or three acres of White Globe: we do not agree to your price, but we could take two or three acres of White Globe at 16s. 6d. per bushel." The plaintiff replies, "I am much obliged by your offer for two or three acres of White Globe, but I cannot accept it—not because I object to the quantity, but because I object to the price;" which is equivalent to saying, "I am willing to sell you two or three acres of White Globe turnips, but the price must be 18s. per bushel." The *89] defendants thereupon say, "We will *take the produce of three acres at the price of 18s. per bushel, to be delivered as soon as harvested." The last words of the letter, "Waiting your reply," created a doubt in my mind; for if a man writes to another "I offer you goods at a certain price, answer and let me know whether I am right as to the terms," that would not be a bargain until the other answered "those are the terms." Then the question is, whether any such weight can be attached to the words "Waiting your reply." I think not, because the plaintiff would have no occasion to restate the terms, or to say "I agree to them," or to do anything but say "Yes, you are right." I confess that on that score I entertained some doubt, but on consideration I think that no rule ought to be granted.

WILDE, B.—I am of the same opinion. To my mind nothing can be more clear than the meaning of the correspondence, and I agree that the letter of the 21st March constitutes a note or memorandum in writing of the bargain within the meaning of the 17th section of the Statute of Frauds.

The only point upon which I will say anything in addition is with reference to the words "Waiting your reply." I agree that if the defendants in using those words intended, for whatever reason, that the matter should be still open, and that the letter should not be an acceptance of the previous offer, there would be no note or memo-

randum within the meaning of the statute. But I do not so regard the words "Waiting your reply." The defendants say, "We will take the produce of three acres of White Globe seed at 18s. per bushel;" and then they go on to say, "Let us know what other sorts you may have to offer, as also Wurzel seed of sorts for 1861 harvest." I consider that the meaning of the words "Waiting your reply," is waiting your reply to that question; and I do not construe those words as meaning *that the contract for the purchase of the [*90 White Globe seed was to be open.

I may add that the Lord Chief Baron is of the same opinion.

Rule refused.

HORSFALL and Another v. THOMAS. May 5.

If a person purchases an article which is to be manufactured for him, and the manufacturer delivers it with a patent defect which may render it worthless, if the purchaser has had an opportunity of inspecting it, but has neglected to do so, the manufacturer is not guilty of fraud in not pointing out the defect.

The defendant employed the plaintiff to make for him a steel gun for which he was to pay by two bills of exchange. The plaintiff delivered the gun with a defect in it which the plaintiff might have seen on examination, and which would have justified him in refusing to receive it. The defendant without examining the gun accepted and delivered to the plaintiff the bills of exchange. Afterwards the plaintiff, in a letter to the defendant, stated that the gun was of the best metal all through and had no weak points that the plaintiff was aware of. The gun was tried and at first answered well, but after repeated trials burst in consequence of the defect in it. The plaintiff having sued the defendant on one of the bills, he pleaded that he was induced to accept the bill by the fraud of the plaintiff.—Held, that there was no evidence for the jury in support of the plea.

DECLARATION on a bill of exchange, dated the 2d July, 1860, drawn by the plaintiffs, by the name and style of "The Mersey Steel and Iron Company," upon and accepted by the defendant for payment to the plaintiffs of 233*l.* 10*s.* twelve months after date.

Plea (inter alia).—That the defendant was induced to accept the bill by the fraud, covin, and misrepresentation of the plaintiffs.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, it appeared, by the evidence of the defendant in support of the plea, that the plaintiffs carried on the business of iron founders at Liverpool under the name of the Mersey Steel and Iron Company. In the year 1859 the defendant applied to the plaintiffs to make for him a cannon, for the purpose of testing some experiments which he was desirous of submitting to the consideration of the War Office. A long correspondence took place between the parties as to the terms, but at length the agreement was entered into contained in the following letters:—

*"Berkeley Square, Tuesday afternoon. [*91

"Dear Sir,

"30th August.

"I had the pleasure of an interview with Mr. M'Neil this morning respecting the 68-pounder 95 cwt. gun. It appears there has been some misunderstanding with regard to the terms of payment. My object simply was to avoid having to pay the money this year (in case I should not receive any from the Government), my expenses having been already so heavy. I intended that one-half should be paid at the commencement of the year and the remainder six months afterwards.

If you can only make the gun on condition of payment this year, I must distinctly tell you that (unless, of course, it is paid for by the Government) it would be entirely out of my power to do so. I should be glad if you would undertake to make the gun, but should feel obliged if you will let me know whether you can do so or not at your earliest convenience, as I have to return an answer to the War Office respecting it.

"Yours very truly,

"G. H. Horsfall, Esq.

"LYNAL THOMAS.

"P. S.—Of course, if the Government pay for the gun before the beginning of next year, I should remit the money to you forthwith; that, or any other arrangement not entailing the payment this year, I am willing to enter into, but it must be done at once."

The plaintiffs wrote in answer as follows:—

"Dear Sir,

September 1.

"Your favour of Tuesday to Mr. G. R. Horsfall has been handed to us by him, requesting us to reply to it as it is a business matter. In reply, we shall be happy to supply you with a steel forging for a 68-pounder 95 cwt. gun, for the sum of 324*l.*, payment to be made by bill, half at six months and half in twelve months, with the understanding that if the Government pay you before these *stipulated *92] times, that you hand over the amount to us in settlement of the bills. We could, if you please, turn and bore the gun (by the latter we mean rough boring) for the further sum of 48*l.* You are aware that we have no machinery for rifling grooves, but no doubt you would be able to get that done at Woolwich. Trusting this arrangement will be satisfactory, we remain, &c.,

"The Mersey Steel and Iron Company,

"L. Thomas, Esq."

"per WILLIAM CLAY."

The defendant wrote in answer, assenting to these terms.

Some correspondence afterwards took place between the defendant and the plaintiffs with reference to some flaws which appeared in the gun during its boring. In consequence of these flaws, the bore was, with the consent of the defendant, increased from 6½ to 7 inches. It was also agreed that the plaintiffs should rifle the gun, for which they were to receive, in addition, 95*l.*, making the price of the gun 467*l.* On the 2d July, 1860, the defendant, in pursuance of the agreement, accepted two bills of exchange for 233*l.* 10*s.*, payable respectively at six and twelve months after date. The gun was delivered, by the defendant's directions, at Woolwich. On the 12th July the defendant wrote to the manager of the Company, stating that he had seen the gun, and was very much pleased with its appearance; and he asked for some drawings of the rifling. These were sent, on the 17th July, to the plaintiffs' agent in London, in a letter which he communicated to the defendant, and which concluded as follows: "The gun is of the best metal all through, and has no weak points that we are aware of, and we hope it will turn out all that Mr. Thomas can desire."—After the first trial of the gun, the defendant wrote to the manager of the Company as follows:—

"22d September, 1860,

"My dear Sir,

"Saturday afternoon.

*93] "The trial of the gun commenced on Friday, but *there was only time to fire four rounds, you will be glad to hear, with

the most perfect success. The largest charge used was 25 lb. with a shell 174 lb. weight. The precision was admirable. The remainder (five) are to be fired on Tuesday afternoon, when I hope to tell you of a good range, as the higher elevations are to be used on that day. I have written to Liverpool to acquaint them with the result this post. The gun shows no sign of a strain. Everybody expected to see it fly to pieces the first shot. If the wish was father to the thought, they must have been wofully disappointed.

"Yours very truly,

"LYNAL THOMAS.

"The greatest range, I believe (for I have not yet seen the list), was something over 4000 yards (some hundreds) at 10° , but the shot fell into the water, and could not be exactly estimated. They cut pretty furrows in the sand."

"My dear Sir,

"26th Sept. 1860.

"The trial is over. Yesterday's results were even better: 28 lb. of powder was fired with a shell of 174 lb. weight, at an angle of $37\frac{1}{2}$ degrees. The gun shows no sign of strain anywhere. Heaven knows what a range we got, but something very large. I shall get the official report, I hope, to-morrow, when I will let you know. I only know that it is greater than Armstrong's 7-inch gun considerably. The precision was beautiful, considering there was only a common sight on the gun, and that not adjusted properly. I shall not write to Liverpool until I get the report, but you can tell them.

"Yours truly,

"LYNAL THOMAS."

The defendant's acceptance, payable at six months' date, was duly paid on 5th January, 1861. The Government required that the gun should be further tried, and accordingly in June, 1861, further trials took place. Six rounds were fired, and at the seventh round the gun burst. The *defendant afterwards wrote to the manager of the [94 Company as follows:—

"My dear Sir,

"London, June 29th, 1861.

"My large gun was tried again yesterday, and after six rounds (21 lb. to 23 lb. of powder) it flew to pieces. On examining the remains, the metal in the bore presented a remarkable appearance, and it is scarcely possible to conceive that the gun could have stood what it did, so defective and unsound was the metal. But the weakest point, and that which probably gave way the first, was immediately behind the trunnions; here there were strong longitudinal flaws which appear gradually to have opened, so that with much smaller charges of powder the gun must eventually have gone, and before many rounds could have been fired. I applied immediately at the War Office for permission to replace it with another gun, with which to continue the experiments, which, I may observe, were for the purpose of testing my system, and not your metal alone, and which, prior to the bursting of the gun, showed results even more remarkable than those of the last trial; an increase, indeed, in both range and accuracy was obtained; so that I believe there will be no opposition offered to the substitution of another gun in place of the first. Under these circumstances you will no doubt wish, on your own account, to supply a perfectly sound facsimile of the last for this purpose. I

understand you to say that you could construct a perfectly sound gun by means of a new process, and I believe that, if the metal were sound, nothing could burst the gun. I should feel much obliged by a speedy reply, as I have my arrangements to make with the Minister of War.

"W. Clay, Esq.,

"Yours faithfully,

"Mersey Company, Liverpool."

LYNAL THOMAS."

The defendant's counsel, in his opening address to the jury, stated *95] that, after the gun burst, it was discovered that *the breech end of the chamber was all soft and spongy, and that a metal plug had been driven into the breech over this soft part; that it would be proved by scientific evidence that this plug caused the bursting of the gun, and had rendered it practically useless. The defendant's counsel then contended that, inasmuch as the plug could not have been put into the gun without the plaintiffs' knowledge, their statement that "the gun was of the best metal all through, and had no weak points that they were aware of," was false and fraudulent, and that, the defendant having been induced by this false and fraudulent representation to accept the bills, the plaintiffs could not recover.

The learned Judge was of opinion that, even if the facts stated by the defendant's counsel were proved, the defendant would not be entitled to a verdict on the plea of fraud: that as the plaintiffs had supplied the defendant with a gun, which, according to his own statement, possessed considerable merits, the circumstance that it burst after repeated trials, in consequence of the insertion of the plug in the breech, was only ground for a cross-action. His lordship then directed a verdict for the plaintiffs for the amount of the bill and interest.

Bovill, in the present Term, obtained a rule nisi for a new trial on the ground of misdirection in stopping the case and directing the jury that the facts opened and proposed to be proved, viz., that the gun had been knowingly, intentionally, and fraudulently plugged, would not be any defence to an action on the bill.

Edward James and Aspinall showed cause (April 28).—The facts relied on by the defendant afford no answer to the action. There was no fraud on the part of the plaintiffs. They undertook to make for the defendant a steel gun for the purpose of his experiments, and he obtained what he bargained for. The gun, when first tested, answered *96] every *purpose for which it was required, and it was not until after repeated trials, and in consequence of extreme pressure, that it burst. [POLLOCK, C. B.—I thought that, even if there was fraud on the part of the plaintiffs, it would be no answer to the action; and that view is supported by the recent case of *Clarke v. Dickson*, E. B. & E. 148 (E. C. L. R. vol. 96). Fraud may be of the most glaring description, and yet so ineffectual as to produce very slight damage. Here the object of the defendant was to ascertain whether a gun of that description would carry an immense weight of metal a great distance; and he has had the benefit of a trial. BRAMWELL, B.—If one party wishes to avoid a contract on the ground of fraud, he must put the other party in the same situation in which he was when the contract was entered into.] The representation relied upon by the defendant as fraudulent was not made until the 17th July,

which was after the gun had been delivered and the bills accepted. [MARTIN, B.—There was no contract by the plaintiffs that the gun should not have a plug in it.] Their contract was to construct a steel gun: they made no representations as to its quality. If any representation is to be inferred from the delivery of the gun, it is simply that it was a gun according to the contract, that is, a steel gun. Whether or no the plug was a defect is not the question. The defendant, in his letter in which he informs the plaintiffs that the gun had burst, does not attribute it to the plug, but to the unsoundness of the metal. In his first letter, he states that the gun was tried with the most perfect success, and showed no sign of a strain. In his next letter he says, that the results were even better. *Lewis v. Cosgrave*, 2 Taunt. 2, which is relied upon by the defendant, was the case of an express warranty.

Bovill and *Honyman*, in support of the rule (*May* 2).—The defendant was prepared to prove at the trial not only *that the gun [97 was unsound, but that the plaintiffs, with knowledge of its unsoundness, had taken effectual means to conceal the defect from the defendant and practised a fraud upon him. [POLLOCK, C. B.—No gun is ever perfect in all its parts. The question is whether this gun had not answered the purpose for which it was bought. At all events the defendant had the use of the gun, and he has no right to keep it and refuse to pay for it.] The fragments are worthless. [POLLOCK, C. B.—That cannot be assumed. There is no evidence that the defendant offered to return the gun, or took any step to rescind the contract. WILDE, B., referred to *Street v. Blay*, 2 B. & Adol. 456 (E. C. L. R. vol. 22).] It is not denied that the defendant had the use of the gun, and some benefit from it, but that does not preclude him from setting up as a defence that the bill was obtained from him by fraud. In *Byles on Bills*, p. 94, 9th ed., after stating that a partial failure of consideration is no answer to an action on a bill of exchange, it is said: "But if fraud can be shown, it is otherwise as between the parties, for there is then no contract." [POLLOCK, C. B.—The evidence tendered was, not that the bill was obtained by fraud, but that it was given in part payment of a contract which was fraudulent. There is a wide distinction between being induced to accept a bill by a fraudulent misrepresentation, and accepting a bill in payment of a contract in which there is some fraud.] The concealment of the defect in the gun is evidence for the jury of fraud. If the plaintiffs had told the defendant that the gun was unsound, he would not have accepted the bill. [BRAMWELL, B.—The defendant must not only show that a fraud was practised upon him, but that he was induced by that fraud to accept the bill. Now, the defendant had not seen the gun, or at all events had not examined it, when he accepted the bill.] At the time when the plaintiffs *must have [98 known that the gun was unsound, they represented to the defendant that it was "of the best metal all through, and had no weak points that they were aware of." Where a contract is void on the ground of fraud, the plaintiff cannot recover upon it, though he may recover on a new implied contract arising from the retention of the goods: *Grounsell v. Lamb*, 1 M. & W. 952,† *Campbell v. Flem-*

ing, 1 A. & E. 40 (E. C. L. R. vol. 28), and notes to *Citter v. Powell*, Smith's Leading Cases 20.

Cur. adv. vult.

BRAMWELL, B., now said.—This was an action by the drawer against the acceptor of a bill of exchange: and there was a plea that the bill was obtained by the fraud of the plaintiffs. The facts, opened by the defendant's counsel and partly proved (so far as is necessary to refer to them), were these:—The plaintiffs contracted with the defendant to make for him a gun, which he was to pay for by two bills of exchange, one at six, the other at twelve months' date. The gun was made, and delivered at Woolwich in pursuance of the defendant's directions, but he made no examination of it. The plaintiff drew on him the bills of exchange, one of which was paid, and on the other this action is brought. According to the opening of the defendant's counsel (and it may be assumed, for the purpose of this decision), there was such a defect in the gun as would have justified the defendant, had he known it, in refusing to accept the gun. Further, that the plaintiffs or their workmen had done something to the gun which would conceal the defect from any person who did not carefully inspect it. The gun was received by the defendant, and fired several times. At first it answered extremely well, but afterwards, as it was said, in consequence of the defect, it burst and became worthless.

*99] Upon this statement of counsel being made and partially proved, my Lord was of opinion that there was no evidence for the jury in support of the plea of fraud, and he directed a verdict for the plaintiffs. A rule for a new trial was obtained on the ground of misdirection, and the question is whether there was any evidence for the jury in support of that plea. We are of opinion that there was not, and that my Lord was right in the view he took of the case.

One matter relied on by the defendant (and which struck me forcibly on the application to me at Chambers to stay the execution) was, that the plaintiffs or their workmen had done something to the gun which concealed the defect in it; and had it turned out, upon the defendant's inspection of the gun, that what was done to it was done for the express purpose of concealing, *and did in fact conceal*, the defect from him; there might have been evidence of a fraudulent intent. But the defendant never examined the gun, and therefore it is impossible that an attempt to conceal the defect could have had any operation on his mind or conduct. If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun, or form any opinion as to whether it was sound, its condition did not affect him. Indeed, the defendant's counsel were obliged to concede that, as regards the question of fraud, the fact that the plug was put in the gun might be left out of consideration; and they were therefore compelled to say that the plaintiffs having told the defendant that the gun was of the best metal all through, and had no weak points that they were aware of, at the same time knowing that there was a defect in it which impaired its value, and might render it worthless, were guilty of a fraud. We are of opinion that that proposition is not maintainable. If it be true in that sense, it is true in every sense, *100] and *therefore we are called upon by the argument for the defendant to affirm, as a general proposition, that wherever a manufacturer makes for a purchaser a chattel, and there is a patent

defect in it which either impairs its value or may render it worthless, although the purchaser has neglected to inspect it, if the manufacturer conceals the defect he is guilty of fraud. We are of opinion that no such proposition can be supported; and that it would be mischievous if it were so. To constitute fraud, there must be an assertion of something false within the knowledge of the party asserting it, or the suppression of that which is true and *which it was his duty to communicate*. Here there was no assertion of an untruth, and the only question is whether there was a suppression of anything which the plaintiffs were bound to make known to the defendant. Now, the manufacturer of an article is not always bound to point out its defects to the purchaser. If, indeed, there be a defect known to the manufacturer, and which cannot be discovered on inspection, he is bound to point it out; but if there be a defect which is patent, and of which the purchaser is as capable of judging as the manufacturer, he is not bound to call the attention of the purchaser to it. It would be mischievous if he were, for in such case he would be bound to point out everything which might by any possibility be considered a defect; and the consequence would be that if the manufacturer, for prudence' sake, pointed out some flaw which made no difference whatever in the value of the article, the purchaser would immediately say, "There is a defect, I must have an abatement of the price."

Whether or no the plaintiffs committed a fraud may be tested in this way. Suppose the defendant had examined the gun, and seen the defect in it, but nevertheless accepted it, there would clearly have been no fraud on the part of the plaintiff because he did not point out the defect. So if he *had seen the defect and rejected the [101] gun. Then suppose the defendant had examined the gun and not seen the defect, would there have been any fraud? If that depends upon his means of knowledge, and the degree of diligence he used to find out the defect; here he had the means of knowledge, and, if he had diligently applied it, by the hypothesis he would have discovered the defect, because it was patent. Therefore it cannot be said there is any fraud in the manufacturer when the purchaser sees the defect, and either accepts or rejects the article, or does not see it because he has not used sufficient diligence to discover it. Then is there any fraud in the manufacturer where the purchaser has an opportunity of inspecting the article and seeing the defect in it, but neglects to do so? To hold that there is, would be to make fraud in the manufacturer dependent on the sense and prudence of the purchaser in inspecting the article and judging for himself, instead of accepting it without first examining it. These considerations seem to me to show, as a matter of demonstration, that the maker of an article in which there is a patent defect is not guilty of fraud because he does not simply tell the purchaser of it, but merely says, "There is the article; judge for yourself whether it is according to your order," and the purchaser does not think fit to do so.

For these reasons my brother Martin and myself are of opinion that my Lord was right, and that there was no evidence of fraud. My brother Wilde did not hear the whole of the argument, and therefore gives no opinion.

POLLOCK, C. B.—I entirely concur in the judgment delivered by my brother Bramwell.

Rule discharged.

*102] *The MAYOR, ALDERMEN, AND BURGESSES of
GREAT YARMOUTH v. MARTHA GROOM.

THE SAME v. DANIEL. April 28.

Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil.

Therefore where a person used a market with a chair and a "ped," that is, a wooden or wicker basket four feet long, two feet and a half wide, and two feet high, with a lid which, being turned back and supported by pieces of wood *not fixed in the soil*, formed a table on which he exposed his provisions for sale:—Held, that he was liable for stallage.

THESE were actions brought to try the right of the defendants, who claimed to be exempt from toll, stallage, chiminage, pontage, pannage, piccage, murage, and passage, as tenants in ancient demesne of the manor of Ormesby, and men of the town of Ormesby, in the county of Norfolk, to place, during the sale of their goods, on the ordinary market-days, in the public market-place of Great Yarmouth, a stall, or stand and seat, for the purpose of exposing goods and provisions to sale, without making any payment for the same.

In the first action the first count of the declaration was for money payable by the defendant for the use, by the plaintiffs' permission, of the plaintiffs' land, and for stallage, groundage, and other duties for and in respect of the defendant having put, placed, and kept in the market, and upon the market-place of the plaintiffs, certain stands, peds, seats, and chairs, for the purpose of exposing goods to sale, and for having placed and fixed in the soil of the market-place divers poles and posts. The second count was in trespass for breaking and entering the land of the plaintiffs, and putting and placing thereon divers stands and peds, chairs, and seats, and placing and fixing in the soil thereof divers poles and posts, and keeping and continuing the same.

The defendant pleaded, to the first count, never indebted; and to *103] the second count (inter alia): First, not guilty. *Fourthly, except as to placing chairs, seats, and stands other than peds, a special plea, that there was a public market held by the plaintiffs upon the said land, and the defendants attended the market with marketable articles; and justifying the use of the peds as being necessary and proper for holding and containing the articles brought to market, and such as were commonly of right used in the market for that purpose, and commonly put and placed on the land for the purpose of exposing their contents to sale, and being a reasonable and customary mode of exposing the articles for sale. Fifthly, as to placing the chairs and seats, a custom from time immemorial for persons using the market for the sale of provisions, and being desirous of having a chair or seat to sit upon during the market, to put and place, and have and enjoy the easement of putting and placing, upon the land a chair or seat near to the provisions exposed to sale. Sixthly and seventhly, similar pleas, alleging the custom to have existed for forty years and twenty years respectively. Issue was joined on these pleas.

In the second action the declaration was for money payable by the defendant for the use, by the plaintiffs' permission, of the plaintiffs' land, and of divers standings in a certain market-place of the plaintiffs.

and for tolls and other duties payable in respect of the defendant having put, placed, and kept upon the market-place certain stands, peds, and baskets for the purpose of exposing goods to sale. The defendant pleaded "never indebted," and issue was joined thereon.

By order of a Judge, these causes were referred to an arbitrator to find the facts, and state a case for the opinion of the Court. The arbitrator stated a case (so far as material to the present question) as follows:—

At and prior to the year 1448 there was, and thence continually until the present time, there has been, a public market for the sale of goods and provisions in the town of *Great Yarmouth, in the [104 county of Norfolk, belonging to the plaintiffs, who are an ancient corporation, and have been incorporated from time immemorial; and the plaintiffs, at and prior to the year 1448, were, and ever since have been, the owners of the soil of the market-place where the market is held. The market is held on Wednesdays and Saturdays in every week, the principal market being on Saturday, and persons (except as hereinafter mentioned) having stalls or stands in the market, or using the market with peds, and with or without chairs or seats, for the sale of provisions, have always paid the corporation for so doing, no money difference having ever been made as to whether chairs or seats were used or not. The places in the market-place where the stalls or stands, or peds or baskets, were placed, have always been determined and allotted to the parties using them by the corporation, and the rate of payment has been from time to time varied by the corporation, but not at any time exceeding a reasonable sum. The payments have continued to be made up to the present time.

The ped is a wooden or wicker basket of the length of four feet, of the width of two feet and a half, and of the height of two feet, with a lid which turns back, and when supported by a stool, or pieces of wood not fixed in the soil, forms a table, upon which the provisions brought to market are exposed for sale.

The defendant Groom used the market with a chair and two peds, in which she brought provisions for sale, and the lids of the peds were turned back, and supported by pieces of wood not fixed in the soil, and formed a table on which she exposed the provisions to sale. The chair and peds were protected by a covering, supported by four poles shod with iron spikes and fixed in the soil, and upon which poles a wooden frame was placed, covered with a tarpaulin. The chair, and peds, and stall were her property. Payment *for [105 her so occupying part of the market-place was first demanded of her by the plaintiffs on the 5th February, 1859. The sum demanded was a reasonable sum, and she refused payment.

The defendant Daniel, by his wife, used the market with a chair and a ped, but without a tarpaulin covering, in which she brought provisions for sale. The lid of the ped was turned back, and supported by pieces of wood not fixed in the soil, and formed a table, on which she exposed the provisions for sale. Payment of a reasonable sum was, on the said 5th February, in like manner demanded of him, and was refused.

The defendant Groom is the owner and occupier of about six acres

of freehold land in the parish of Ormesby St. Michael, in the county of Norfolk, of which about three-quarters of an acre were allotted to her under a local enclosure Act in 1842, in respect of rights of common belonging to her other land. She also occupies three acres of land as a yearly tenant.

The defendant Daniel is the owner and occupier of about seven acres of freehold land in the parish of Scratby, in the county of Norfolk, of which about two acres were allotted to him under the same enclosure Act. He also occupies about seven acres of land at Scratby as yearly tenant.

It was proved, on behalf of the defendants, that the manor of Ormesby, with the members, is a manor of ancient demesne, and extends into the several parishes of Ormesby St. Margaret, Ormesby St. Michael, the hamlet of Scratby, and several other parishes.

Some of the inhabitants of Ormesby St. Margaret, Ormesby St. Michael, and Scratby have attended at and kept the market at Great Yarmouth as far as living memory extends, and during that period have never paid, nor, until the year 1859, been required to pay, for *106] their chairs and *peds in the market-place, whether the same have been covered and protected, as in the defendant Groom's case, or not; and there was no evidence given before the arbitrator, on behalf of the plaintiffs, that such persons ever paid for the use of the market-place for their chairs, peds, or coverings. Such of the inhabitants of Ormesby St. Margaret, Ormesby St. Michael, and Scratby as have kept the market have been sometimes owners and occupiers of land in those parishes, sometimes occupiers only, and the provisions they have brought for sale have sometimes been only the produce of their own lands, sometimes bought for the purpose of sale, and sometimes the property of other persons residing in those parishes and in other parishes, for whom they have sold them on commission.

The case came on for argument on the 11th November, 1861, when it was by consent remitted to the arbitrator to find the tenure of land of the defendants, and whether the goods sold were the produce of such land, and also to raise the question whether placing the peds entitled the corporation to stallage.

The arbitrator accordingly found as follows:—"That the land of the defendant Martha Groom is not of the tenure of ancient demesne, but is, as is stated in the said special case, part of freehold tenure and part of leasehold tenure. And that the land of the defendant Benjamin Daniel is not of the tenure of ancient demesne, but is, as is stated in the said special case, part of the freehold tenure and part of leasehold tenure. And that part of the goods sold by the said Martha Groom were the produce of her said land, and other part of such goods were not the produce of her land, but the produce of the land of another inhabitant of the said parish of Ormesby St. Michael; and that all the goods sold by the said Benjamin Daniel were the produce of his said land."

*107] *The questions for the opinion of the Court are, whether the plaintiffs are entitled to stallage, or any payment in the nature thereof, for or in respect of the placing and using the said peds in the said market-place, in the manner stated in the case; and whether the

defendants, or either of them, are exempt from paying any toll, or making any payment to the plaintiffs, for the use of the market by them in the manner stated in the case.

If the Court shall be of opinion that the plaintiffs are entitled to stallage, or any payment in the nature thereof, for or in respect of the placing and using the said peds as aforesaid, and that the defendants, or either of them, are not exempt therefrom, or that the plaintiffs are entitled to toll, or any payment in the nature thereof, for the use of the market as aforesaid, and that the defendants, or either of them, are not exempt therefrom, judgment is to be entered for the plaintiffs, *ls.* debt or damages against both or one of the defendants, as the Court shall decide. If the Court shall be of opinion that the plaintiffs are not entitled to stallage or toll, or any payment in the nature of stallage or toll, as aforesaid, or that the defendants, or either of them, are exempt from stallage and toll, and from making any payment as aforesaid, judgment is to be entered for both or one of the defendants, as the Court shall direct.

Welsby, for the plaintiff.—The arbitrator has found as a fact that the lands of the defendants are not of the tenure of ancient demesne, and therefore they are not entitled to exemption from stallage or toll. Even tenants in ancient demesne are not entitled to exemption from stallage. In *Fitzherbert's Nat. Brev.*, Vol. 2, p. 226, tit. *Writ of being quit of Toll*, no mention is made of stallage, and the toll from which tenants in ancient demesne are said to be exempt, *is [*108 toll properly so called. "Toll" is a reasonable sum payable in respect of commodities sold in a market; but stallage is in the nature of rent, and is payable for the liberty of erecting stalls, and occupying a portion of the soil of the market. Thus, in *Roberts v. The Overseers, &c., of Aylesbury*, 1 E. & B. 423 (E. C. L. R. vol. 72), it was held that the lessees of a market were rateable to the relief of the poor for stallage, because it was a payment in respect of the exclusive occupation of the soil, though for a limited time; but that they were not rateable for toll, because it was only payable for goods sold, without reference to whether they had been deposited on the soil. Though every person has of common right a liberty of coming into a public market for the purpose of buying and selling, yet he has not of common right the liberty of placing a stall there, but he must pay a compensation for it: *The Mayor, &c., of Northampton v. Ward*, 1 Wils. 107; 2 Str. 1288, Com. Dig. *Market* (F. 3). In *The Mayor, &c., of Norwich v. Swann*, 2 W. Black. 1116, it was held that trespass would lie for setting tables in a market-place for the sale of goods thereon, without leave of the owner of the soil. [MARTIN, B.—Though a person may enter a market to sell his goods, he has no right to occupy a portion of it, to the exclusion of others, without paying for it.] The case finds that the places in the market where stalls, or stands, or peds, or baskets were placed, have always been allotted by the corporation to the parties, so that they have an exclusive use of the soil.

Hurlstone (*Palmer* with him), for the defendants.—The plaintiffs are clearly not entitled to toll, for toll can only be claimed by grant or prescription. The question then is whether they are entitled to stallage, and that depends on whether the peds or baskets used in the

*109] manner described *were "stalls." Now, stallage and piccage are incident to the soil in a market or fair: Com. Dig., tit. *Market* (F. 3), *Heddey v. Welhouse*, Moore 474: and the owner cannot claim any payment in respect of them unless there has been something in the nature of a disturbance of the soil, or of the right of soil. [WILDE, B.—Stallage is money paid for a stall in a market, piccage for breaking the ground.] Merely placing baskets on the ground in a market is not a disturbance of the right of soil: *Wigley v. Peachey*, 2 Ld. Raym. 1589. [BRAMWELL, B.—That case only decided that the owner of the soil had no right to distrain the plaintiff's goods damage feasant because he refused to pay toll: it did not decide that he might not have maintained an action for a reasonable compensation in respect of the use of the soil.] Every person has, at common law, a right to frequent a market for the purpose of selling his commodities, and the defendants have merely exposed them for sale in baskets with the lids turned back so as to afford more space, and they have used chairs to rest themselves. [MARTIN, B.—In the *Termes de la Ley*, "stallage" is said to be "money paid for pitching stalls in fairs or markets, or the right of doing it."] The definition in *Tomlin's Law Dictionary* is the same as that in *Blunt*, viz., "stallagium, stabulum, statio—the liberty or right of pitching or erecting stalls in fairs or markets." In *Spelman's Glossary* it is defined as "*jus stationis, jus erigendi officinæ*." These definitions show that, to constitute stallage, there must be something erected on the soil. *Townend v. Woodruff*, 5 Exch. 506, 512,† decided that a person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods. There *Alderson, B.*, said:—"Erecting a stall is very different from *110] placing goods in baskets on the ground for *sale. A person must bring his produce to market in baskets or sacks or other convenient modes." Here the defendants have only adopted a reasonable mode of exposing their goods for sale in baskets.

POLLOCK, C. B.—I am of opinion that our judgment ought to be for the plaintiffs. None of the cases cited on behalf of the defendants seem to me to interfere with the plaintiffs' right to maintain these actions. As my brother *Bramwell* observed, all that the case of *Wigley v. Peachey*, 2 Ld. Raym. 1589, decided was that the parties had adopted a wrong remedy by distraining the goods damage feasant, and that the distress was not sustainable. Here the parties have adopted the remedy which the Court pointed out in that case; and, therefore, in my opinion the plaintiffs are entitled to recover.

MARTIN, B.—I am of the same opinion. When it was found by the arbitrator that the land of the defendants was not of the tenure of ancient demesne there was virtually an end of the case. It is evident that was the real question intended to be raised by the parties, because, at the commencement of the original case, it is stated that "these were actions brought to try the right of the defendants who claimed to be exempt from toll, stallage, chiminage, pontage, pannage, piccage, murage, and passage, as tenants in ancient demesne of the manor of *Ormesby*, in the county of Norfolk." That right is negatived by the finding of the arbitrator; and then the question arises upon the claim in respect of stallage. Now, the

arbitrator finds that "persons (except as hereinafter mentioned) having stalls or stands in the market, or using the market with peds, and with or without chairs or seats for the sale of provisions, have always *paid the corporation for so doing, no money difference having ever been made as to whether chairs or seats were used or not." [*111 So that it is clear, *prima facie*, that all persons using these peds exclusively used a portion of the market, and paid for it. But the argument of Mr. *Hurlstone* is that the use of these peds is not the use of a stall. It seems to me that is a question of fact for a jury. If, indeed, a person carried commodities in a basket to the market for sale, merely using the basket to exhibit the commodities to customers, and making no other use of the ground, except when tired to place the basket upon it, intending when rested to go to another part of the market, such an use of the ground would not be stallage. It would be nothing more than using the market for hawking, and it might as well be said that cattle in a market, which it is impossible to keep stationary, have an exclusive occupation of one spot of ground, and therefore stallage is payable in respect of them. But in these cases there was an exclusive occupation of a particular portion of the market by chairs and peds placed upon the ground. In one case the chairs and peds were covered by a tarpaulin and supported by poles fixed into the soil, so that the ground was actually disturbed; in the other case the lid of the ped was supported by sticks not fixed in the soil. Therefore these cases seem to me to fall within the definitions of stallage cited by Mr. *Hurlstone*, and also of that given in the *Termes de la Ley*; and if I were asked to draw an inference I should say that these were stalls.

BRAMWELL, B.—The only question is whether, under the circumstances stated, the stallage is payable by any person using the market in the way the defendants did. I agree with my brother Martin that it is a question of fact whether these chairs and peds, as placed on the ground by *the defendants, were stalls, and as matter of fact I determine it against the defendants. It may be difficult to give [*112 a strict definition of a stall, but I think that in these cases the defendants used stalls.

WILDE, B.—I am of the same opinion. The real defence fell to the ground when the arbitrator found that the defendants were not tenants in ancient demesne. At one time I thought there might possibly be an exemption as old as the right to toll or stallage; but I am satisfied that the exemption is confined to tenants in ancient demesne.

Then the only remaining question is whether these chairs and peds, placed in the manner described, were stalls. Mr. *Hurlstone* was compelled to concede that if they were the plaintiffs' right was established. Now, there was a continuous occupation of a portion of the market by an erection placed there for the purpose of selling goods or exposing them for sale. That seems to me a "stall." I think it is immaterial, for this purpose, of what it was constructed, and whether fixed into the ground or not. For these reasons I think that the plaintiffs ought to recover.

Judgment for the plaintiffs.

*118]

*DODD *v.* BURCHELL.(a) *Jan. 24.*

The owner of a plot of ground built upon it a house facing the highway, and at the back of the garden of the house he built a cottage. The access to the cottage was from the highway down a passage by the side of the house and its garden wall. The first floor of the house extended over part of this passage, and there was a door in the wall of the house and another door in the garden wall which opened into the passage. Across the passage about three feet from the back wall of the house there was another door, and this part of the passage was covered by a slab or "lean-to" which was cemented to the back part of the house. In 1851 the owner conveyed the cottage in fee to the defendant by the dimensions, and abutments delineated in a plan, "be the same more or less." The plan described the defendant's land as eighty-seven feet six inches, of which five feet six inches consisted of a part of the passage over which the first floor of the house was built. In 1853 the owner conveyed the house in fee to the plaintiff. The deed purported to convey the whole of that part of the passage over which the first floor of the house was built; but there was no mention of any right of way. In 1861 the defendant blocked up the door in the wall of the plaintiff's house and in his garden wall. These doors had been used by the occupiers of the house for the purpose of going from it to a water-closet in the garden, but there was another way through the kitchen, a window of which opened into the garden.

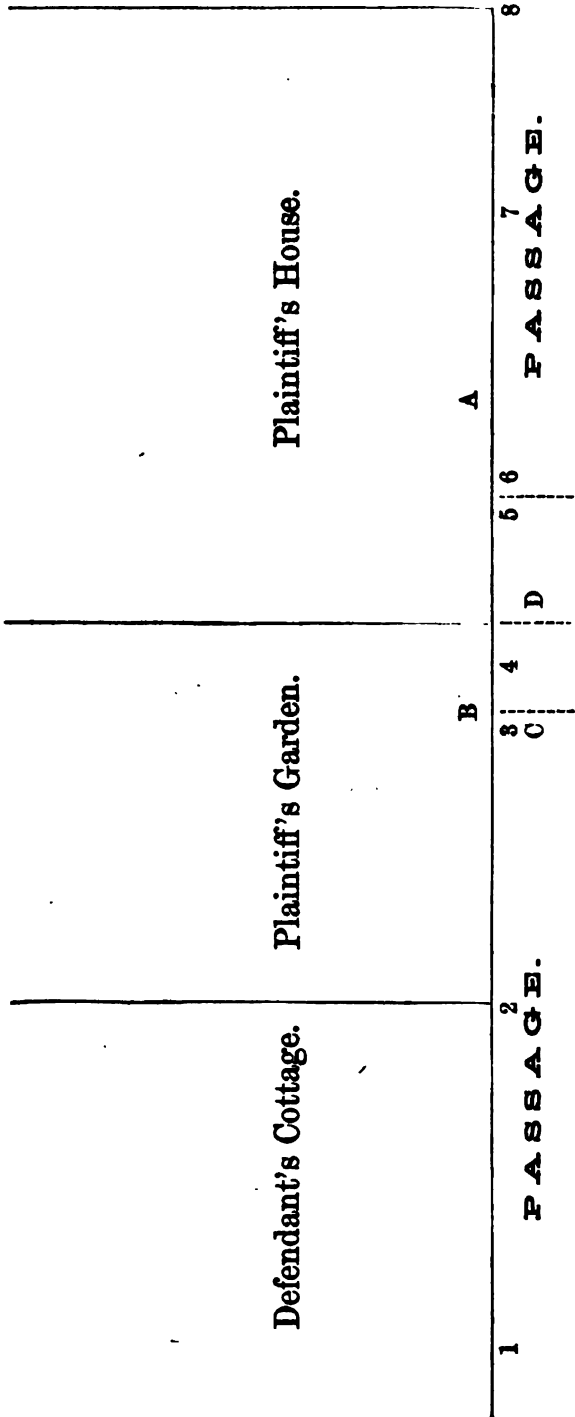
Held:—That the plaintiff had no right of way over the passage either by grant or of necessity.

THE first count of the declaration stated, that the defendant broke and entered a messuage and land of the plaintiff, situate and being No. 1, Church Terrace, Church Road, Battersea, in the county of Surrey, and pulled down, prostrated, and destroyed an enclosure, lean-to, and door of the plaintiff, parcel of the said messuage and land, and blocked up a door of the plaintiff opening into the same, and erected a doorway and door upon the said messuage and land, and kept the same locked up and fastened over and across a certain passage, parcel of the said messuage and land; by means of which premises the back entrance of the plaintiff to his wash-house, garden, and water-closet, parcel of his said messuage and land, from his house and from the highway there was obstructed, and he was deprived of all entrance thereto, except through one of the rooms of the said house, and his said house was thereby lessened in value.—Second count: For that the plaintiff was possessed of a dwelling-house and garden, No. 1, Church Terrace, Battersea, in the county of Surrey, and by reason thereof was entitled to a way over certain land from his said house, *114] and from a street *called Church Street into his said garden, and from his said garden over the said land to his said house and to the said street called Church Street; and the defendant by wrongfully fixing a door across the said land, and wrongfully blocking up and fastening the same, prevented the plaintiff from using his said way, whereby his said house and garden became and were lessened in value, and the plaintiff was inconvenienced in the occupation thereof.

Pleas.—First: except as to the trespasses in the first count complained of, so far as they relate to a part of the messuage and land in that count mentioned: Not guilty. Second; to the first count, except as in the first plea excepted.—That the messuage and land in that count mentioned, except as aforesaid, were not, nor was either of them, the plaintiff's. Third: to the residue of the trespasses in the first-

(a) Decided in Hilary Term.

H I G H R O A D .



The part of the passage marked 1, 2, 3, 4, 5, together with the lot marked "Defendant's Cottage," was coloured *Pink*, in the plan. The part of the passage marked 6, 7, 8, was coloured *Blue* in the plan.

count complained of:—Payment into court of 30s. Fourth: to the second count.—That the plaintiff was not possessed of the dwelling-house and garden, as alleged. Fifth: to the second count:—That plaintiff was not entitled to the way, as alleged.—Issues thereon.

At the trial, before Blackburn, J., at the Surrey summer Assizes, 1861, the following facts appeared:—The plaintiff was owner and occupier of a house, No. 1, Church Terrace, Battersea. The defendant was owner and occupier of a house called Park Cottage, situate at the back of the plaintiff's garden. The land on which these houses stood was formerly part of a plot of garden ground, which in the year 1842 was conveyed by the then owner to one Jones in fee. Jones built upon it a row of houses fronting the highway called Church Terrace, and he afterwards built Park Cottage at the back of the garden of No. 1, Church Terrace. The access to Park Cottage was from the highway by a passage at the side of No. 1, Church Terrace, and its garden *115] wall. The first floor of No. 1, Church Terrace extended *over this passage. There was a door (a) in the side wall of No. 1, Church Terrace, and another door (b) in its garden wall, which opened into this passage. Across the passage, about three feet from the back wall of No. 1, Church Terrace, and at right angles with the door in the garden wall, there was another door (c) This part of the passage was covered with a slab or "lean-to," which was cemented to the back wall of No. 1, Church Terrace. (d) From this spot the passage up to Park Cottage was uncovered.

In the year 1851 Jones conveyed Park Cottage to the defendant in fee, with a right of way through the passage, by the following description:—"All that piece or parcel of ground situate in the rear of a certain terrace called Church Terrace, &c., which said piece or parcel of ground contains the several dimensions and abutments more particularly shown and delineated in the plan or ground plot drawn in the margin of this deed and therein coloured pink, be the same a little more or less, and all that cottage, &c., together with the right of egress, ingress, and regress, at all times, in, by, and through the way or passage coloured blue," as the same were then held and enjoyed by Jones. The plan in the margin of the deed described the length of the defendant's land, coloured pink, as eighty-seven feet six inches, of which five feet six inches consisted of a part of the passage over which the first floor of No. 1, Church Terrace extended.

In the year 1853, Jones conveyed to the plaintiff in fee, No. 1, Church Terrace, with the garden. The deed purported to convey the whole of that part of the passage over which the first floor of No. 1, Church Terrace extended, and consequently included the five feet six inches already conveyed to the defendant. The plaintiff's conveyance *116] made no mention of any right of way. The quantity of land conveyed to the defendant corresponded with the description in his deed, within a few inches.

In March, 1861, the defendant blocked up the door-way from the passage into the plaintiff's garden. The defendant also removed the door across the passage, and placed across it another door in a line

(a) Marked A on the plan.
(b) Marked B on the plan.

(c) Marked C on the plan.
(d) Marked D on the plan.

with the back wall of the plaintiff's house, which door he kept locked. He also removed the "lean-to."

Evidence was given on the part of the plaintiff that the occupiers of No. 1, Church Terrace, from the time the house was built, used to go from the house by the side-door into the passage and from thence through the door into the garden, for the purpose of getting to a water-closet. It might, however, be reached by going through a kitchen in which there was a window which opened into the garden. This mode of access was used as frequently as the other. It was admitted that the money paid into Court was sufficient to cover any damage done to the plaintiff's walls, and by the removal of the "lean-to."

Upon these facts, a verdict was entered by consent for the plaintiff, with 40s. damages; leave being reserved to the defendant to move to enter the verdict for him.

Shee, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the plaintiff had not a right of entrance into, or exit from, his garden into the passage from the defendant's house to Church Terrace, through the door alleged to have been blocked up.

Holl showed cause.—First, the ownership of the land having been in one freeholder, and there having been for a number of years a continuous user of the way, upon the severance of the land there was an implied reservation of the way, without which the land could not be reasonably *enjoyed. It is immaterial whether the dominant [*117 or servient tenement is first conveyed: the purchaser takes the land with the burthen or benefit which the owner has attached to it. The law is thus stated in *Gale on Easements*, p. 81, 3d ed.:—"Upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have no legal existence as easements; and, secondly, of all those easements without which the enjoyment of the several portions could not be had at all." In *Nicholas v. Chamberlain*, Cro. Jac. 121, it was held by all the Court "that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require." [POLLOCK, C. B.—A right to the enjoyment of a conduit is very different from a right of way. WILDE, B.—A conduit is a thing actually enjoyed with a house, and passes with a grant of the house; but it is not so with a right of way.] *Nicholas v. Chamberlain* establishes this general principle, that where there has been a continuous and apparent easement during the unity of ownership, it is not extinguished by the severance of the heritage, if it be necessary for the enjoyment of the property. That principle was recognised and affirmed by this Court in *Pyer v. Carter*, 1 H. & N. 916.† [POLLOCK, C. B.—That was the case of a drain which ran under two adjoining houses, one of which was purchased by the defendant; and the other by the plaintiff; and

*118] we held that the *plaintiff was entitled, by implied grant, to the use of the drain for the purpose of conveying water from his house, as it was used at the time of the defendant's purchase.] That case is an authority that if the owner of property has, during its unity, made such a disposition of it that the one part has become servient to the other, the easement remains although the property is aliened by separate conveyances. [MARTIN, B.—In *Pyer v. Carter*, 1 H. & N. 916, §22,† the Court said that “it seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*.” That is sufficient to support that case. If the owner of land which has a natural stream flowing through it, grants to one person a part of the land, and the remainder to another person, neither has a right to stop the flow of water through the land of the other. In fact, *Pyer v. Carter* was no more than an implied grant of a right analogous to that of flowing water.] It is not requisite that the way should be of absolute necessity for access to the property: a way of necessity may exist, which is not of itself a continuous or permanent easement, but one to be exercised from time to time while the necessity continues to occur: *Pheysey v. Vicary*, 16 M. & W. 484.† [POLLOCK, C. B.—A right of way used and enjoyed during the unity of ownership will not pass upon a severance of the tenements unless there is something in the conveyance to show an intention to create the right *de novo*: *Pearson v. Spencer*, 1 B. & S. 571 (E. C. L. R. vol. 101).] Here, the way is necessary for the reasonable enjoyment of the property, since it is the most convenient mode of access to the premises: *Pinnington v. Galland*, 9 Exch. 1.† [POLLOCK, C. B.—In *Morris v. Edgington*, 3 Taunt. 31, Sir J. Mansfield said:—“It would be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had.”] In considering whether a way is one of necessity, the cost of constructing a new way cannot be taken into consideration, for by the word necessity must be understood the necessity at the time of the conveyance, and as matters then stood without alteration: *Pyer v. Carter*, 1 H. & N. 916, 922.†

Secondly, the land over which the right of way is claimed did not pass by the conveyance to the defendant. There are two sources of ambiguity on the face of the conveyance: first, it does not state the quantity intended to be conveyed, but merely says that the dimensions and abutments are delineated in a plan coloured pink, “be the same a little more or less.” If the dimensions in the plan be taken they will not correspond with the land claimed by the defendant. If the ambiguity is one which admits of parol evidence to show what was intended to pass, the words “more or less” may extend the quantity five or six feet. Next, the premises are described as “the same as are now held and enjoyed by W. Jones;” but at that time the door was three feet in arrear of the plaintiff's house, and continued so for some time after the plaintiff had bought it. No doubt the intention

was to convey only to where the door stood.—On this point he referred to *Quaintrell v. Wright*, Bunb. 274; *Longchamps v. Fawcett*, 1 Peake 71; *Doe d. Freeland v. Burt*, 1 T. R. 701; *Anstee v. Nelms*, 1 H. & N. 225.†

Shee, Serjt., and *H. Lloyd* appeared in support of the rule, but were not called upon to argue.

*POLLOCK, C. B.—I am of opinion that the rule ought to be absolute. There is a wide difference between that which is [*120 substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury. In some cases it may appear a hardship that a party is not allowed to show that the language of a deed does not express his meaning; but why should a solemn instrument under seal be set aside because certain facts exist from which a jury might infer that the parties did not mean what they have said? It must be admitted that in some cases there have been expressions of regret at the operation of general rules of law. That more frequently occurs in the construction of wills, where the Courts have said that although the testator may not have meant what he has written, they must decide according to the language he has used. In the present case, I own, I feel no regret, because the principle contended for is of so vague, uncertain, and unsatisfactory a nature, that it would unsettle questions of real property, by bringing under the consideration and for the decision of a jury matters which it has been the object of those who made the law and those who administer it, to submit to the judgment of a Court. For these reasons, and upon principle, I think that the rule ought to be absolute.

MARTIN, B.—I am of the same opinion. We must ascertain the right which passed under the deeds. A Court, in construing a conveyance, ought, so far as is possible, to put itself in the position of the grantor and grantee, and then read the *writing. Having [*121 placed itself in that position, it is that which is written which is to determine the rights of the parties. Mr. *Holl* has cited *Gale on Easements*, where many of the propositions laid down are founded on the civil law, which is no authority for the administration of the common law of England. There is no sounder principle than this, that, where the parties have put their contract into writing, it is the writing alone which is to guide the Courts in putting a construction upon it. It is argued that all the land which the defendant claims did pass to him, because his conveyance describes it of the dimensions and abutments delineated in a plan, "be the same a little more or less," but that cannot extend it or diminish it by five feet. Then reliance was placed on the words, "as the same were then held and enjoyed by the vendor," as showing that the right of way was reserved; but I think they cannot so operate. *Pyer v. Carter*, 1 H. & N. 916.† went to the utmost extent of the law; but, if considered, that decision cannot be complained of, for if a man has two fields, drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop

up the drain, for there would be the same right of drainage as before, since the land was sold with the drain in it. I agree with the law as laid down in that case, and I think it may be supported without extending the doctrine to a right of way.

CHANNELL, B.—I am also of opinion that the rule ought to be absolute. It seems to me that the plaintiff is out of Court unless this is a way of necessity, and upon the facts I am of opinion that it is not. The plaintiff's claim is founded on this, that he is the owner of *122] the soil of a part of the *passage coloured pink, and that it was not conveyed to the defendant. There is some ambiguity in the defendant's conveyance, but its meaning is explained by the plan. It describes the land conveyed to the defendant as eighty-seven feet six inches, of which five feet six inches consist of part of the passage. According to that measurement the conveyance is substantially correct, and there is a mere inaccuracy which is obviated by the words "be the same a little more or less."

WILDE, B.—A right of way may exist by prescription, grant, or necessity. It is not suggested that there is any right by prescription. Then, is there by grant? There is a grant of the adjoining land, but without any express reservation of the way, or any words from which it can be inferred that the plaintiff was to have the right claimed by him. Mr. *Holl* was therefore compelled to resort to the third class, viz., a right of way by necessity; and he cited several authorities to show that where a right of way must exist by necessity, it may be implied though not reserved in a deed. Then, was this a way of necessity? It appears that at the time of the grant, in respect of which the right of way is claimed, there was a way from the house into the garden, and that way now exists. But it is said that the way now claimed is more convenient than the other. Then comes the question whether the plaintiff can claim it as a way of necessity on account of its great superiority over the other way. It seems to me that it would be most dangerous to hold that where a deed is silent as to any reservation of a way, because it is more convenient to use than another way, it must exist as a way of necessity. There is no foundation whatever for such a doctrine.

*123] For these reasons, upon the first point I am clearly of *opinion the rule ought to be absolute to enter the verdict for the defendant.

Upon the second point I say nothing, as I did not hear the whole of the argument for the plaintiff. Rule absolute.

ALLAN and Others, Assignees of LAMONT, a Bankrupt, v. SUNDIUS and Others. April 30.

The defendants, who were ship-brokers, being employed by an agent of the French Government to procure for them the charter of two ships, L., who was also a ship-broker, informed the defendants of two ships, called the "New York" and the "Glasgow," which might be chartered. After some negotiation and correspondence between L., the defendants, and the owners of the ships, the "New York" was chartered for six months, and the defendants wrote to L. stating, that "in consideration of his having assisted them in procuring the charter of the "New York," they engaged to pay him a commission of two and a half per cent. The "Glasgow"

was afterwards chartered, and the charter of the "New York" was renewed for another six months, and L. then claimed commission at the same rate on the charter of the "Glasgow" and also on the renewed charter of the "New York."

Held:—First, that evidence was admissible of a custom among ship-brokers that an "introducing broker" should receive renewed commission on every renewal of a charter effected through him, since such a custom was not inconsistent with the written agreement: Per Martin, B., and Bramwell, B. Pollock, C. B., dissentiente.

Secondly, that it should have been left to the jury to say whether the agreement to pay commission extended also to the "Glasgow."

THE declaration stated, that by an agreement made by R. Lamont, before his bankruptcy, with the defendants, in consideration of R. Lamont introducing the defendants to certain persons who were owners of steamships, to wit, "The Glasgow and New York Steamship Company," and Mr. Langlands, and assisting the defendants in procuring charters of steamships belonging to them from the French Government, the defendants agreed with R. Lamont that they would divide with him their commission, to wit, 5% per cent. on such charters, and on receiving the same from them, pay the same to him.—Averments: that the said R. Lamont, before his bankruptcy, did so introduce the defendants to the said persons, and did assist them in procuring charters of steamships as aforesaid; and that through and by reason of the premises, divers charters of divers steamships of the said Company, to wit, of the "Glasgow" *and of the "New York" were so procured and effected as aforesaid, and the defend- [*124 ants received large sums for commission in respect thereof: Yet the defendants did not nor would divide with R. Lamont, or with the plaintiffs since his bankruptcy, their commission or any part thereof, and wholly failed and refused so to do, and did not nor would receive or pay the said share of commission so due to R. Lamont, &c.

Pleas (inter alia).—Non assumpsit.

The particulars of demand were as follows:—

To Commission due to the bankrupt on the charters of the "New York," S. S., from 20th November, 1854, to 20th June, 1856, at 2½ per cent.	£	s.	d.
	2,474	19	9
Less the Commission for the first six months of that time		860	17 4
	£1,614	2	5
The like Commission in respect of the charters of the "Glasgow," S. S., from the 10th February, 1855, to 10th August, 1856, at 2½ per cent.		2,354	4 10
	£3,968	7	3

At the trial, before Pollock, C. B., at the London Sittings after last Michaelmas Term, it appeared that in the year 1854, the bankrupt, Lamont, was partner in a firm carrying on business at Liverpool as ship-brokers, who were agents of "The Glasgow and New York Steamship Company." According to Lamont's evidence, he, having learnt that the French Government were in want of transport-steamers for the Crimea, and that Messrs. Pastrie and Co., of London, were the agents of the French Government, and that the defendants Sundius and Co. were ship-brokers employed by Messrs. Pastrie, on the 7th of November, 1854, called on Sundius and Co. and had an interview with one of the firm, named Duncan, and told him that the "Glasgow and New York Steamship Company" had two ships, the

*125] "New York" and *"Glasgow", which might be chartered by the French Government. At the same time Lamont stated the dimensions of the "Glasgow," but not of the "New York." Duncan said, that he thought they might do; and Lamont then proposed to communicate with the owners, saying, if he brought about a charter of these vessels he should wish to divide the commission with the defendants. To this Duncan assented, adding their commission would be 5*l.* per cent., besides 3*l.* per cent. which Messrs. Pastrie would claim as their (Pastrie's) commission from the French Government, making 8*l.* per cent. in all. According to Lamont's evidence, it was then agreed that if the charters were effected he was to receive 2*l.* 10*s.* per cent. as his share of the commission. Lamont then communicated with the Company, and received a letter, dated 7th of November, from Langlands, the manager, entertaining the proposal, which he showed to Duncan, and after some further correspondence Langlands came to London, and accompanied by Lamont and Duncan went to the offices of Messrs. Pastrie, who then chartered the "New York" for the French Government at 56*s.* per month per ton, for six months from the 10th of November, but no provision was made for its renewal.

The following letter was then written:—

"London, November 10, 1854.

"Mr. R. Lamont, Liverpool.

"Sir,—In consideration of your having introduced us to Mr. Langlands, and assisted us in procuring the charter for the screw steamship 'New York,' we hereby engage to allow you two and a half per cent. (2½) out of our commission as we receive it.

"Your obedient servants,

"SMITH, SUNDIUS and COMPANY."

*126] The "Glasgow" was also mentioned at that interview and *her dimensions given, but there was no written agreement respecting her, because (it was said) she was then on her homeward voyage from America. On the following day (according to Lamont's evidence) Duncan came to him and represented that the commission which the French Government would have to pay, amounting in the whole to 8*l.* per cent., would probably be objected to, and asked him to consent to take 1*l.* per cent. only, and give the Company the benefit of the other 1*l.* 10*s.* per cent. Lamont stated that he did not intend, by so consenting, to alter the agreement under which he was to have half the commission received by the defendants; but only to agree that he would himself remit 1*l.* 10*s.* per cent. to the Company on receiving the 2*l.* 10*s.* from the defendants. Another letter was then written in the same terms as that of the 10th of November, except that two and a half per cent. was altered into one per cent. This letter was also dated the 10th of November, and was substituted for the other. A long correspondence then ensued between Lamont, the Company, and the defendants, the result of which was that Lamont received the sum of 860*l.* 17*s.* 4*d.* as his share of the commission at 2½ per cent. on the first six months of the charter of the "New York." Lamont afterwards left England, and on his return found that the "Glasgow" had been chartered by the French Government through Messrs. Pastrie, and that in December, 1855, the char-

ter of the "New York" had been renewed for a further period of six months; and that the defendants had received their commission on these charters. Another long correspondence took place between the parties, Lamont claiming 2l. 10s. per cent. as his share of commission on the charter of the "Glasgow" and the renewed charter of the "New York," which the defendants refused to pay.

Upon this evidence the Lord Chief Baron was of opinion [*127] that the contract between Lamont and the defendants was contained in the substituted letter of the 10th of November, and that Lamont was only entitled to 1l. per cent. commission on the charter of the "New York" for a period of six months.

It was submitted, on behalf of the plaintiffs, that the agreement between Lamont and the defendants was a question for the jury, depending on the evidence of Lamont as to the verbal agreement between himself and Duncan, which, together with the correspondence, explained the substituted letter of the 10th of November. The plaintiffs' counsel then proposed to prove a usage of trade among ship-brokers by which an "introducing broker" was entitled to share the commission on all renewals by the same parties of charters effected through his introduction. The learned Judge was of opinion that evidence of the custom was inadmissible, since it was inconsistent with the agreement, and thereupon the plaintiffs elected to be nonsuited.

Karslake, in the following Term, obtained a rule nisi to set aside the nonsuit on the ground of misdirection, and the rejection of the evidence, against which

Bovill, *Lush*, and *Watkin Williams* showed cause (April 29th).—The evidence as to the custom was properly rejected; for it is inconsistent with the written agreement of the 10th November, 1854. The plaintiffs can have no claim beyond the amount to which Lamont was entitled under the agreement, and that has been paid. [WILDE, B.—The sharing commission among brokers is not usually a matter of custom, but depends on special agreement.] The custom would import a new term into the agreement. [MARTIN, B.—The difficulty I have is whether the plaintiffs were not entitled to have the evidence submitted to the jury; whether or no it would have enabled them to recover the *amount claimed is another matter.] There is no [*128] ground for saying that there was any other contract than that contained in the letter of the 10th November, 1854; and, if the custom be annexed to it, a share of the commission would be payable on all renewals of the charter, however numerous. [POLLOCK, C. B.—Without the custom the plaintiffs certainly had no case.]

Karslake and *Milward*, in support of the rule.—Evidence of the custom was admissible. There is nothing in the agreement inconsistent with the custom. As regards the "New York," the defendants, in consideration of Lamont having assisted them in procuring a charter for that vessel, engaged to pay him a percentage out of their commission. But when that agreement was entered into, there was a custom among brokers that the "introducing broker" should receive from the "working broker" a share of the renewed commission upon every renewal of the charter, and there is nothing in the agreement which necessarily excludes such a custom. The circumstance that a contract is reduced to writing does not prevent a custom from attach

ing, if it be not repugnant to or inconsistent with the agreement: *Humfrey v. Dale*, 7 E. & B. 266 (E. C. L. R. vol. 90), in error, 1 E. B. & E. 1004 (E. C. L. R. vol. 96), *Field v. Lelean*, 6 H. & N. 617,† *Brown v. Byrne*, 3 E. & B. 703 (E. C. L. R. vol. 77). The claim for commission in respect of the "Glasgow" stands on a different footing, because that vessel is not mentioned in the agreement of the 10th November, but there was evidence, which ought to have been submitted to the jury, of an agreement to pay a share of the commission on the charter of that vessel also.

Cur. adv. vult.

*129] BRAMWELL, B.—I am of opinion that the rule ought to *be absolute. There are two questions, both of which I shall briefly advert to. One arose thus:—The bankrupt, Lamont, said, "I introduced you, the defendants, to certain shipowners, and you procured a charter for them from the French Government; and part of the bargain between us was that I was to receive a portion of your commission;" viz. 2l. 10s. per cent., which, I believe, is the ordinary commission allowed to "introducing brokers," as Lamont was called. Lamont also said:—"The French Government has renewed the charter with the shipowners, and you, the defendants, have received a repetition or renewal of your commission upon this renewed charter, and I claim from you a repetition or renewal of my commission, and I will prove there is a custom which entitles me to make that claim." Evidence to that effect was tendered, and rejected by my Lord: I think erroneously.

X There is no doubt about the principle. A custom may be annexed to documents with which it is not inconsistent. The question then is, whether this custom is inconsistent with the written agreement between Lamont and the defendants. If inconsistent or incoherent with the agreement, it cannot be annexed to it. It seems to me it would be coherent with it, because, as I understand the bargain between Lamont and the defendants, it was this: "I will receive from you 2l. 10s. per cent., as my share of your commission." To my mind there would have been nothing inconsistent, if, that being in writing, the writing had gone on to say, "not only upon the first charter, but upon any renewed charter in respect of which you may get any commission from the shipowners." Whether the evidence, if admitted, would have proved that agreement it is not necessary to say. I think such a custom ought to be narrowly watched; but, nevertheless, I think that, according to law, the evidence was admissible.

*130] *The other point was this:—It was said by Mr. Karlake that, independently of any custom, it was a question for the jury whether the bargain between Lamont and the defendants did not extend to the "Glasgow" as much as to the "New York." I think there was evidence to that effect, which ought to have been submitted to the jury. In my opinion, therefore, on both points, the plaintiffs are entitled to have the rule made absolute.

MARTIN, B.—I am of the same opinion. The facts of the case are these:—The bankrupt, Lamont, who formerly carried on business as a ship-broker at Liverpool, was examined on behalf of the plaintiffs, his assignees, and his evidence was, that, in November, 1854, he came to London and had an interview with Duncan, one of the partners in

the defendant's house, and he then communicated to Duncan that he knew of two vessels, the "New York" and the "Glasgow," which might be chartered by the French Government (for whom the defendants were authorized to act by Messrs. Pastrie, the agents of that Government), and that Duncan agreed that he should share the commission with the defendants in respect of those two vessels. That was what Lamont proposed; and he persevered in stating that he was to have one-half of the commission. There was, therefore, his positive evidence to that effect, but there was also a variety of letters and communications between him and the defendants and the Glasgow and New York Steamship Company, which were to a great degree inconsistent with it; and I should not have been surprised, if the cause had gone to the jury, nor shall I be surprised should the case be again tried, if the jury find they do not believe parts of Lamont's evidence, and rather give credit to his writings. However, the question whether the evidence of Lamont was true or false is for the jury, not for the Court.

*With respect to the "New York," his claim was this:— [*181 That he was a party to the employment of the defendants in the sense I have stated; and he swore to an express agreement to divide the commission with them. I entertain no doubt that an "introducing broker" is entitled to receive, and does receive, from the "working broker" a portion of his commission. That is a common practice in London and other places where ships are chartered. As regards the "New York," the plaintiffs admit that Lamont has received all he is entitled to in respect of the first charter; and they proposed to prove a custom that, on a charter of this kind being renewed, the "introducing broker" was entitled to receive a portion of the commission payable on the subsequent charter. Whether the evidence would have established the custom, or whether the custom, when proved, would have entitled the plaintiffs to recover, I do not know; but it seems to me they were entitled to give evidence what the custom was, and that it was not competent to the Judge to reject it.

With respect to the "Glasgow," the claim depends on a different principle. The first communication between Duncan and Lamont took place on the 7th of November, 1854, and on the 10th a written agreement was entered into. A letter was written, stating the precise terms of the agreement between Lamont and the defendants with respect to the "New York;" but there was no writing with respect to the "Glasgow." Now I agree that if two persons, negotiating a contract, consent to reduce it to writing, that writing is conclusively the contract. But, for the purpose of bringing that rule to bear, it must be established that the parties meant to reduce the entire contract into writing; and if it be established that only a portion of it is reduced to writing, there is nothing in law to prevent evidence being given to show what the real bargain was. *I am clearly of [*182 opinion that the letter of the 10th of November, 1854, does not refer to the "Glasgow" (assuming the parol evidence given by Lamont to be true), and that it was intended to refer to the "New York" only; consequently, putting aside the custom altogether, the plaintiffs have a right to have it submitted to the jury whether they

are entitled to recover in respect of the first charter of the "Glasgow." That having been withdrawn from them, in my opinion there ought to be a new trial. I am of this opinion simply upon the facts of the case. There are letters in which a vast deal is inconsistent with Lamont's statement. The jury are the proper tribunal to try that; and in my opinion it was not competent for the Judge to withdraw it from them.

POLLOCK, C. B.—I agree with my brother Bramwell that a custom such as this, which controls the written contract of the parties, and makes them agree to something which they have not expressed, ought to be carefully watched, and restrained within reasonable limits. And I own I think that, where one broker introduces a vessel to another, a custom to share the commission so long as the vessel shall be chartered by the same party, or indeed by any other party through the same broker, is of extremely doubtful legality. But I am not influenced in my decision by that consideration. | A custom may, by + evidence, be attached to any ordinary course of business, so as to introduce a term not inconsistent with that course of business; and undoubtedly, where one broker introduces a vessel to another, a custom may be shown that the broker so introducing it, is entitled to a share of the commission, on that particular charter; but I think such a custom cannot be extended to a special agreement between the parties, entirely independent of the usual course of business. If the *133] *relation of the parties is settled by an agreement not corresponding with the usual course of business, I think the custom ought not to be received in evidence. The case, as before me, certainly presented that aspect. The agreement with respect to the commission was entirely out of the ordinary course of business; the parties professing to act, not according to the ordinary course of business, but by their special agreement. For that reason I rejected the evidence that was offered, not as evidence of a custom controlling every agreement, but as evidence of what the custom was in the ordinary course of business. It is clear that this agreement was not in the ordinary course of business, and therefore the custom does not apply.

Of course I express this opinion with some doubt, after hearing that my brothers Martin and Bramwell are of a different opinion, but I still think that what I did at Nisi Prius was correct.

WILDE, B.—As I did not hear the whole of the argument on both sides, I take no part in the judgment; but, so far as I heard the argument upon the question of the admissibility of evidence of the custom, I think that the Lord Chief Baron was right in rejecting it, and I agree in the reasons he has given. Rule absolute.

***LACHARME v. THE QUARTZ ROCK MARIPOSA GOLD MINING COMPANY. May 13, June 17. [*184**

In an action against a joint stock Company, the Court or a Judge has power, under the 14 & 15 Vict. c. 99, s. 6, and the 17 & 18 Vict. c. 125, s. 50, to order a director of the Company to allow inspection of their documents in his possession.

An affidavit of a director, in answer to an attachment for disobedience of such an order, stated that he had not on the day the order was made, or at any time since, the documents in his possession, custody, or power, and that ever since the order was made it had been out of his power to comply with it:—Held, that the affidavit was insufficient; and the Court ordered the director to be examined *viva voce* before a Master, under the provisions of the 46th section of the Common Law Procedure Act, 1854.

THIS was an action against a joint stock Company, incorporated under the 7 & 8 Vict. c. 110, to recover twenty-one months' rent of a mine in California, held by them under a lease from the plaintiff, dated the 20th of July, 1855.

On the 3d February, 1862, an order was made by Bramwell, B., at Chambers, "That the plaintiff or his attorney be at liberty to inspect, at the office of the defendants' attorney, the minute-book of the directors of the defendants' Company, and also the shareholders minute book, and take copies of such parts thereof as relate to the plaintiff's case; and also of the lease from the plaintiff to the defendants, dated the 20th July, 1855," &c. Inspection having been applied for and refused, on the 27th March another order was made by Bramwell, B., "That Mr. John Carter, one of the directors of the defendants' Company, forthwith give the plaintiff's attorney or agent inspection, pursuant to the order of the 3d February, 1862, of the documents mentioned in such order." The affidavit in support of the latter order stated, "That the defendants' Company had ceased to carry on business for some time; and deponent believed there were not any funds or property belonging to defendants against which a sequestration could be issued for the purpose of enforcing the said order." Carter made no affidavit.

**J. Brown*, in the present Term, obtained a rule calling on the plaintiff to show cause why the order of the 27th of March should not be rescinded; against which [*135

Field and *Murray* now showed cause.—The 14 & 15 Vict. c. 99, s. 6, empowers the superior Courts of common law, and each of the Judges thereof, to "compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party, &c., and if necessary to take examined copies of the same, &c., in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of equity at the instance of the party so making application." Therefore, if in this case a discovery could have been obtained by filing a bill against Carter in a Court of equity, the plaintiff is entitled to the inspection which has been ordered. The practice of Courts of equity in this respect dates as far back as the year 1682. Anonymous, 1 Vern. 117: "A bill against a Corporation to discover writings. The defendants answer under the common seal; and so, being not sworn, will answer nothing in their own prejudice. Ordered that the clerk of the Company, and

such principal members as the plaintiff shall think fit, answer on oath, and that a Master settle the oath." So, in a bill against the East India Company, one of the officers of the Company was made a defendant, in order to discover some entries and orders in the books of the Company: *Wych v. Meal*, 3 P. Wms. 310. Lord Talbot, C., there said:—"It has been an usual thing for a plaintiff, in order to have a discovery, to make the secretary, book-keeper, or other officers *186] of a Company defendants." Those authorities were *recognised and adopted by Lord Eldon in *Dummer v. The Corporation of Chippenham*, 14 Ves. 245, where a demurrer to a bill of discovery filed against some individual member of a Corporation was overruled. Unless the Court will enforce an order of this kind, there is no means of obtaining an inspection of documents where the defendants are a Corporation. In this case the Company has no funds which can be sequestered. [BRAMWELL, B.—If a Corporation refuses to obey an order of the Court, may not the individual members be attached?] There are cases of indictments against corporations and of mandamus directed to them, but there is authority that the members may be attached. The subject was discussed in *Mackenzie v. The Sligo and Shannon Railway Company*, 9 C. B. 250 (E. C. L. R. vol. 67), where it was held that an attachment would not lie against an incorporated railway Company for the non-performance of an award.

Lush (J. Brown with him), in support of the rule.—The learned Judge had no power to make the order on Carter. Whatever may be the practice of Courts of equity, the 14 & 15 Vict. c. 99, s. 6, has defined the parties who may be compelled to allow an inspection of documents. Before that statute Courts of common law had only a limited power to order inspection. The 6th section enables them, on application by "either of the litigants, to compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party, &c., in all cases in which, previous to the passing of that Act, a discovery might have been obtained." In the case of a corporation, the individual members are not the litigant parties, but the corporate body. The documents of *137] which inspection is to be given are those in respect *of which a discovery might, before the 14 & 15 Vict. c. 99, have been obtained; but by the 50th section of the 17 & 18 Vict. c. 125, if the party against whom the application for a discovery is made is a body corporate, the Court or a Judge may order "that *some officer* to be named of such body corporate shall answer on affidavit," stating what documents they have in their possession or power. Therefore the Court is not at liberty to adopt the practice of Courts of equity, but must proceed in the manner prescribed by that enactment. [MARTIN, B.—If it appears that a director has the documents in his possession, the more convenient course is to make an order on him.] It is not a question of convenience, but whether the statute has authorized it. [POLLOCK, C. B.—It is the province of the Court so to construe a remedial statute as to carry out the intention of the legislature. If it appears that a member of the Corporation has possession of a document of which inspection is required, we have as much power to order him, as a party connected with the Corporation, to allow an inspection as we have to order the attorney, secretary, or other officer.]

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. I think that the order of my brother Bramwell was quite correct. The power to make such an order upon a director of a corporate body is not only within the intention of the legislature but absolutely necessary, if the jurisdiction is to be exercised. A director, as a member of the Company, is substantially a party to the suit. The words of the 50th section of the Common Law Procedure Act, 1854, are:—"Or if such party is a body corporate, that same officer to be named of such body corporate, shall answer on affidavit." The words "to be named" should be read as if in a parenthesis. Then the question is, by whom *is the officer to be named? Clearly [*138 by the Court or Judge, not by the body corporate.

MARTIN, B.—The question depends on the construction of two Acts of Parliament, the 14 & 15 Vict. c. 99, s. 6, and the 17 & 18 Vict. c. 125, s. 50; and in construing them we ought, as far as we can, to give effect to the intention of the legislature. The real object of the legislature was to save litigant parties the expense of a bill of discovery in a Court of equity, and therefore we ought in a case of this kind to do what a Court of equity would do. Now the 14 & 15 Vict. c. 99, s. 6, enacts that the Court or a Judge may, "on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding." Then who are substantially the litigants in an action against this corporation? The directors; for they are the acting parties. The section goes on to say, "in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill or by any other proceeding in a Court of equity at the instance of the party so making application as aforesaid to the said Court or Judge." I think it would be giving an extremely narrow construction to the Act not to allow a Court of common law the same power in this respect as a Court of equity. The 50th section of the Common Law Procedure Act, 1854, goes further than the other statute. It enables the Court or Judge "to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the *mat- [*139 ters in dispute." It seems to me, that was intended to aid and carry out the former practice; and, in actions against a corporation, to confer on us the power of naming the officer most competent to give the information. It is no straining of the Act to hold that if a Company permits one of its directors to have the custody of its documents, such director is an "officer" for the purposes of discovery. In my opinion we only effectuate the intention of the legislature by granting the plaintiff that which he is clearly entitled to.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The question is whether the order of my brother Bramwell is void for want of jurisdiction. That depends upon the construction of the 6th section of the 14 & 15 Vict. c. 99, and the 50th section of the Common Law Procedure Act, 1854. I think that those two sections should be read together. The 50th section of the latter Act

provides for the case where the party against whom the application is made is a body corporate, which was omitted in the 6th section of the former Act. Then, reading the two sections together, Mr. *Lush* admitted that an order might have been made against an officer of the corporation if such officer was named by the corporation. But the language of the 50th section is, "or if such party is a body corporate, that some officer to be named of such body corporate shall answer." It seems to me that a director of a Company having the possession of documents in respect of which a discovery is sought, is an "officer" within the meaning of that enactment.

BRAMWELL, B.—I am glad that the Court is of opinion that my *140] order was right, because it would be unreasonable *that an order should be made against a corporation which could not be enforced. I think that this is a convenient mode of proceeding, and in accordance with the intention of the legislature.

Rule discharged.

On the 31st of May the orders of Bramwell, B., were made rules of Court, and were afterwards personally served on Carter, and an inspection of the documents demanded. On the 12th of June the plaintiff's attorney made an appointment for such inspection at the office of the defendant's attorney. The plaintiff's attorney attended pursuant to the appointment, but was informed by the defendants' attorney that he had no documents for inspection.

Murray, in Trinity Term, obtained a rule calling on John Carter to show cause why an attachment should not issue against him for his contempt in not giving inspection of the documents, pursuant to the said rules of the 3d and 27th February; against which

Lush showed cause (June 17) upon the following affidavit made by John Carter.—"That I had not on the 3d day of February last, nor have I at any time since had in my possession, custody, or power any of the documents mentioned in the order of Bramwell, B., of that date; and that it is, and ever since the said 3d day of February has been, out of my power to comply with such order, or the two several rules made in the cause of the 31st day of May last, by giving inspection of the documents, or any of them."—It was submitted that this affidavit was an answer to the application.

*141] *Field* and *Murray*, in support of the rule.—The affidavit *is insufficient. It merely states that Carter had not the documents in his possession, custody, or power on the day when the first order was made, or at any time since; but it gives no information as to where the documents are. It can scarcely be credited that a director of the Company should not know what has become of the documents belonging to the Company. [MARTIN, B.—The affidavit is certainly most unsatisfactory. The proper course would have been for Mr. Carter to have stated all he knew as to the custody of the documents. BRAMWELL, B.—I think the affidavit is insufficient, because Mr. Carter swears that it is out of his power to comply with the order without stating the facts upon which that conclusion is founded. It may be that he is swearing to the truth of his attorney's notion of the law.] The Court has the option either to issue the

attachment or to direct a *vivâ voce* examination of Carter, under the 46th section of the Common Law Procedure Act, 1854: By adopting the latter course, all the information which the plaintiff requires might be elicited.

POLLOCK, C. B.—We are all of opinion that the affidavit is insufficient. It gives no information whatever as to the custody of the documents. The best course will be to order Mr. Carter to be examined *vivâ voce* before the Master, and the rule must be enlarged for that purpose.

MARTIN, B., and BRAMWELL, B., concurred.

Rule accordingly.

***GIBSON and Another v. CRICK and Another.** *April 17.* [*142

The defendant, a shipowner, being desirous of chartering a vessel, the plaintiff, a ship-broker, introduced him to S., another broker, who introduced the defendant to L., who mentioned to B. that the charter was wanted, and through the negotiations of B. with the defendant, D. chartered the vessel. The plaintiff sued for commission, alleging that an "introducing broker" was entitled by custom to a share of the commission. The plaintiffs' counsel proposed to ask a witness the following question:—"What is the custom with regard to payment of broker's commission, when a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?"—Held, that the evidence was properly rejected.

Seemle, that such a custom would be bad in law.

DECLARATION for work done by the plaintiffs for the defendants, &c.
Plea:—Never indebted.

At the trial, before Martin, B., at the London Sittings after last Hilary Term, it appeared that the action was brought to recover the sum of 60*l.* 18*s.* 4*d.*, claimed by the plaintiffs for commission in respect of procuring for the defendants a charter of their ship, the "Indus," under the following circumstances:—The plaintiffs were ship-brokers, and the defendants were the owners of five ships, called the "Indus," "Hubertus," "Oscar," "Llangollen," and "Plantagenet." In February, 1861, the defendants applied to the plaintiffs to raise money for them on a mortgage of the "Indus," stating that they were in want of charters for the ships. The plaintiffs said that they could procure charters for three of the ships, with cargoes of coals, from Wales to France. They attempted to obtain for the defendants a loan of 1100*l.*, but were unsuccessful. One of the plaintiffs introduced the defendant Crick to Messrs. Spicer and Fysh, brokers, in London, who acted on behalf of a coal company in Wales. Messrs. Spicer and Fysh introduced the defendant Crick to a Captain Lay, with whom negotiations were opened for chartering the "Hubertus," "Oscar," and "Llangollen." These negotiations however failed. Messrs. Spicer and Fysh then mentioned to one Bowan, a member of another firm of ship-brokers in London, that charters were wanted [*143 for these ships, and on the 12th of October Bowan chartered the "Oscar" and "Hubertus" on the part of the Dynover Coal Company. The plaintiffs were paid commission on the charters of these ships. Lay subsequently mentioned to one De Mattos that a charter was wanted for the "Indus," whereupon De Mattos applied to Bowan, who negotiated with the defendant Crick, and on the 30th of October the "Indus" was chartered by De Mattos for a period of twelve

months, to carry coals between Newport and Bordeaux. The plaintiff Gibson, who was a witness, stated that he had heard that the "Indus" was chartered by De Mattos, and that the firm of which Bowan was a member and Messrs. Spicer and Fysh intended to share the commission; and that he had told the defendant Crick that he should expect a share of the commission, but Crick refused to recognise him in the transaction.

The plaintiffs' counsel proposed to ask a ship-broker the following question:—"What is the custom with regard to payment of broker's commission, when a broker introduces another broker to a shipowner who subsequently negotiates with the broker introduced?" This question was objected to, and the learned Judge refused to allow it to be put at that stage of the cause, being of opinion that there was no evidence that the charter of the "Indus" by De Mattos had been procured through the introduction of the plaintiffs. No further evidence having been offered, the learned Judge directed a verdict for the defendants.

Kenealy now moved for a rule nisi for a new trial, on the ground of misdirection and rejection of evidence.—First, there was evidence in support of the plaintiffs' claim which ought to have been submitted to the jury. The plaintiffs have been paid their commission on the *144] charters of the "Hubertus" and "Oscar," and they are equally entitled to it on the charter of the "Indus," for all the charters were procured through the introduction of the plaintiffs. The repudiation by the defendants of the plaintiffs' claim to commission in respect of the "Indus" cannot deprive them of their rights. It was a question for the jury whether the defendants did not introduce the two principals, and if so, according to the custom of brokers, the plaintiffs are entitled to a share of the commission. [WILDE, B.—The plaintiffs never brought the two principals together, they had no communication with De Mattos.] The plaintiffs introduced the broker who introduced De Mattos. The broker entitled to commission is that one through whose introduction the vessel is ultimately chartered, not the broker by whom the charter-party is prepared: *Burnett v. Bouch*, 9 C. & P. 620 (E. C. L. R. vol. 38). In *Cunard v. Van Oppen*, 1 F. & F. 716, Erle, J., said:—"The law is clear that the broker who first introduces the purchaser, although the negotiation is completed between the principals, is entitled to commission."—Secondly, evidence of the custom was improperly rejected. [POLLOCK, C. B.—In my opinion, such a custom as the plaintiffs rely on, if it does exist, is bad in law. The share which the plaintiffs had in the transaction is far too remote.] Whether the custom is good or bad, the evidence ought to have been received, and it should have been left to the jury to say whether in point of fact such a custom existed.

POLLOCK, C. B.—We are all of opinion that there ought to be no rule. This is an attempt to go one step beyond any extravagant claim ever made by a broker. A custom for one broker to be paid for another broker's work may be good where there is a direct communication between the introducing broker and the principals, but if a *145] shipowner in want of a charter applies to a broker who gives the name of another broker, and he mentions a third broker whom the principal employs, it is simply preposterous that the broker

originally applied to should have any claim on the principal. A custom is alleged in support of it, but no usage can make such a custom good. The facts show that the plaintiffs' claim cannot be supported, even if the question rejected had been allowed to be put and the answer given which it was intended to elicit. But I think the question was properly rejected. When it was tendered, the facts did not warrant its being put. No connection between the introducing broker and the charterer was shown. Even if such a custom could have been proved, I should have been inclined to hold it bad. The case of *Cumard v. Van Oppen*, 1 F. & F. 716, is no authority for the proposition contended for. It appears by the report that the evidence varied as to the custom. If that were so, there was no such custom as that attempted to be proved.

BRAMWELL, B.—I am of the same opinion. There was no evidence for the jury in support of the plaintiffs' case, if the question objected to was properly rejected. The plaintiffs' case was that they had done the work and ought to be paid for it; but it is clear to my mind that they had not, for they were not the persons who negotiated the charter.

Then was the proposed evidence properly rejected? I think it was, on two grounds: first, because the custom, if proved, would be unreasonable; and secondly, because it would not apply to this case. The plaintiffs having been employed as brokers to obtain charters for the defendants' ships, went to other brokers who attempted to negotiate with one Lay for the charter of three of the ships. These negotiations failed, but, by means of them, Lay knew that the defendants had ships which they wished to charter, and [*146 went to De Mattos and got him to charter the ship called the "Indus." In short, the plaintiffs spoke to their broker, who spoke to Lay, who spoke to De Mattos, who chartered the ship. Now the question proposed was, "What is the custom with regard to payment of brokers' commission, when a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?" But the plaintiffs did not introduce Lay, who procured the charterer, De Mattos, for the defendants. Therefore the question falls short of what it was necessary to prove in order to show a custom to support the plaintiffs' case. Under these circumstances, it seems to me monstrous that the defendants should be liable to the plaintiffs. Where is it to stop? It is a hardship on parties affected by a custom, that it should be proved by persons interested in establishing it, and some restraint ought to be placed upon them. It is unreasonable that the defendants, who are liable to the broker who effected the charter, should also be liable to the plaintiffs. There is some reason for saying that if the two principals think fit to disregard the middleman, the introducing broker is entitled to be paid. But that does not apply to this case. I think that if such a custom as that attempted to be proved could have been established, it would have been bad; and therefore on both grounds there ought to be no rule.

WILDE, B.—I am of the same opinion. The facts are somewhat complicated, and I at first was under the impression that Lay, who ultimately procured the charter of the "Indus," was interested in it, so that he was in effect a charterer. If so, though the plaintiffs did

not negotiate the charter, if they first introduced the principals, they *147] would *be entitled to commission. It is immaterial whether the introducing broker conducts the negotiation, or the principals employ another broker; the broker who has first brought them together is entitled to some commission. If Lay had been a charterer of the vessel, the plaintiffs would have established their case; but he was not. The plaintiffs entered into a negotiation with him, which failed. Lay having thereby become acquainted with the fact that the defendants wanted a charter for the "Indus," obtained one from De Mattos. I think that the share the plaintiffs had in the transaction is too remote. One broker might speak to another, he to a third, he to a fourth, and so on through a dozen people,—is the first person who set in motion the news that a charterer was wanted entitled to commission from the shipowner? I think not.

With respect to the custom, I think, as a matter of law, the plaintiffs were not entitled to put the question. If it is necessary to prove a custom, the party seeking to establish it must begin by showing the existence of the custom, not by asking what the custom is.

MARTIN, B.—I also think that the rule ought to be discharged, and I am of that opinion for the reasons already given, viz., that the plaintiffs' connection with these transactions was too remote to entitle them to commission from the defendants. The facts of the case have been stated by my brothers Bramwell and Wilde too favourably for the plaintiffs. The defendants applied to the plaintiffs to obtain a loan on mortgage of the "Indus," when the plaintiffs consented to raise for them 1100*l*. Negotiations for that purpose were entered into between the plaintiffs, the defendants, and Lay, which ultimately failed, but in consequence of them Lay became acquainted with the fact that a charter was wanted for the "Indus." Lay then communi- *148] cated, through *Bowen, with De Mattos, and proposed to him to charter the "Indus." De Mattos agreed, and communicated with the defendants through Bowen. Lay was introduced by the plaintiffs to the defendants at the office of Spieer and Fysch. This is all the plaintiffs had to do with the matter, so far as the "Indus" is concerned. I think that the connection of the plaintiffs with the chartering of the "Indus" by De Mattos, was too remote to entitle them to claim commission. In such a state of things, no such custom could have been proved as that relied on by Mr. *Kenealy*. In my opinion, the cases as to claims of this kind have gone far enough, and ought not to be extended. Rule refused.(a)

(a) See *Allan v. Sundius*, ante, p. 123.

MAYALL v. HIGBEY. May 26.

The plaintiff lent some photograph portraits to a person who became insolvent, and his assignees having offered the photographs for sale by auction, the defendant purchased them, and by photographically printing from negatives he obtained reduced copies which he published and sold. The plaintiff brought an action against him and recovered nominal damages on a count for the infringement of the plaintiff's right:—Held, that the plaintiff was entitled to a writ of injunction to restrain the defendant from taking or selling any more copies of the photographs, and also to recover them or their value under a count in detinue.

THE first count of the declaration stated that the defendant wrongfully and unlawfully took and kept possession of the plaintiff's goods, that is to say, photographic portraits, and while the said goods continued to be the property of the plaintiff, and were not the property of the defendant, and were wrongfully and improperly in his possession, and while the plaintiff was of right entitled to prevent, by writ of injunction thereafter claimed, the defendant from using the same by making therefrom, and photographically printing from negatives obtained therefrom, reduced or other copies of such portraits, and from selling such copies, *wrongfully and unlawfully used the same by making therefrom, or photographically printing from [*149 negatives obtained therefrom, reduced and other copies of such portraits; and thereby the said portraits of the plaintiff have become less valuable to him, and he has been deprived of the profits which he would have derived by selling copies or duplicates of such portraits or of the photographic negatives from which the said portraits had been obtained.—Second count: that the defendant detains from the plaintiff his goods, to wit, photographic portraits and photographic negatives. And the plaintiff claims a return of the goods mentioned in the last count, or their value, and 10*l.* for their detention, and 1000*l.* for the causes of action in the first count mentioned. And the plaintiff has sustained damage by the defendant unlawfully using the plaintiff's said portraits, as in the first count mentioned, and would sustain further damage by the repetition and continuance of such user, and has requested the defendant, who has refused, to desist from such user; and the plaintiff claims a writ of injunction to restrain the defendant from using the plaintiff's said photographs, in manner in the first count mentioned, and from committing of injuries of the like kind relating to the same right therein mentioned.

Pleas (inter alia).—First: not guilty. Secondly, to the first count: that the goods were not the plaintiffs. Thirdly, to the same count and to the claim of writ of injunction: that the goods were not wrongfully and improperly in the possession of the defendant. Fourthly, to the same count: that the plaintiff was not of right entitled as therein by him alleged. Fifthly, to the second count: that the defendant did not detain the goods. Sixthly, to the second count: that the goods were not the plaintiff's.—Issues thereon.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, the following facts appeared:—The *plaintiff, [*150 who was a photographer, had lent to one Tallis, the proprietor of a newspaper called "The Illustrated News of the World," a number of photographic portraits of eminent individuals, for the purpose of being engraved and published in that newspaper. Tallis having become insolvent, assigned all his estate and effects to trustees for the benefit of his creditors. The trustees sold the newspaper and stock in trade by auction, together with about ninety photographic portraits belonging to the plaintiff. The defendant bought these portraits, and by photographically printing from negatives he obtained reduced copies, which he published and sold. On application to a Judge at Chambers, an order for an injunction had been obtained to restrain the defendant from using the portraits, by making therefrom, and

photographically printing from negatives obtained therefrom, reduced or other copies of the photographs, and from selling such copies.

A verdict was found for the plaintiff on the first count, with 40*s.* damages, and on the second count with 25*l.* damages; leave being reserved to the defendant to move to enter the verdict for him on the first count, if the Court should be of opinion that the right alleged and the right to an injunction were not proved.

Montague Smith, in the present Term, obtained a rule nisi accordingly, against which

Vaughan Williams (*Leith* with him) now showed cause.—The property in these photographs being in the plaintiff, the defendant had no right to make use of them. The only question then is, whether the plaintiff has sustained any damage by reason of the defendant's wrongful act. The value of the plaintiff's property is depreciated by reason of the multiplication and sale of copies. No question of copy-right arises here, but the doctrine laid down in *Jefferys v. Boosey*, 4 H. L. 815, 867, with respect to literary works, applies equally to artistic works. Erle, J., there said:—"The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages, if any are sustained." This case is analogous to that of *Prince Albert v. Strange*, 1 Mac. & G. 25, where all the authorities are reviewed by Lord Cottenham.

The Court then called on

Montague Smith and *Aspland*, to support the rule.—Unless the plaintiff has some right in the nature of copyright, the first count cannot be supported. The right to an injunction depends on the 79th section of the Common Law Procedure Act, 1854, which provides that where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such injury. That enactment confers on Courts of law a new remedy by injunction where there is a legal right, but it does not create any new equitable right. Then what legal right has the plaintiff apart from his right to maintain detinue? He is entitled to a return of the goods, or their value; and if he recovers damages, he can maintain no further proceeding. But by claiming an injunction *152] the plaintiff is in effect attempting to obtain two *causes of action out of one transaction. [POLLOCK, C. B.—Suppose the owner of a celebrated statue lent it to a friend, would the latter have a right to copy it? It is an injury so to deal with the property of another as to lessen its value.] If the defendant pays the damages the photographs become his property; therefore the claim to the injunction is too large, for it seeks to restrain the defendant from selling his own property. [POLLOCK, C. B.—It is essential not only that the defendant should not make copies, but also that he should

not sell them. If a person surreptitiously copied a picture, a Court of equity would interfere to prevent him from availing himself of it in any manner whatever. The right of a person as against another who has surreptitiously copied his work is distinct from the right of copyright, which is the creation of the statutes.] The plaintiff has no copyright in these photographs: *Reade v. Conquest*, 9 C. B., N. S. 755 (E. C. L. R. vol. 99). [BRAMWELL, B.—The wrongful act of which the plaintiff complains is a compound one, namely, copying the plaintiff's works and selling the copies. The plaintiff claims damages for the injury done to him by taking the copies, and an injunction to restrain the defendant from doing further injury by selling them. If the plaintiff had recovered substantial damages on the first count, we might, as in the case of a penalty, in our discretion have refused an injunction.(a)]

POLLOCK, C. B.—The damages on the first count were merely nominal, and only in respect of the infringement of the plaintiff's right. The question of copyright does not arise. The rule ought to be discharged, and the injunction must issue.

MARTIN, B., and BRAMWELL, B., concurred.

Rule discharged.

(a) See *Carnes v. Nesbitt*, 7 H. & N. 778.†

***PARKINS and MATILDA his Wife v. SCOTT and SARAH his Wife. May 8. [153]**

Where slanderous words are not actionable per se, no action will lie against the original utterer of the slander for damage resulting from a repetition of it unauthorized by him.

Therefore where the defendant imputed adultery to the plaintiff's wife in his absence, and she voluntarily repeated the slander to her husband, whereby he refused to cohabit with her:—Held, that no action was maintainable against the defendant.

Quare, whether the loss of consortium is ground of special damages.

SLANDER.—The declaration stated that the defendant, Sarah, falsely and maliciously spoke and published of the plaintiff, Matilda, the following words:—"Go in, you nasty slut, and I'll tell you what you are; you have been a whore from your cradle" (meaning thereby that the plaintiff, Matilda, had been and was then an unchaste woman, and had after her intermarriage been guilty of adultery). Whereby the plaintiff, Matilda, was not only greatly injured in her credit and reputation, but by reason of the premises also her husband refused any further to cohabit or live with her, and ceased therefrom any longer so to do, and thence hitherto has ceased to live, reside, or cohabit with her; whereby the plaintiff, Matilda, was deprived of the fellowship, comfort, and support of her said husband, which she had heretofore enjoyed, and is still deprived thereof.

Plea.—Not guilty.

At the trial, before Williams, J., at the last Leicestershire Spring Assizes, it was proved that the slanderous words set out in the declaration were addressed by the defendant, Sarah, to the plaintiff, Matilda, in the presence of her mother and other persons, but in the absence of her husband, he being then from home. On his return, the plaintiff, Matilda, repeated to him the slanderous words, as well as some

language of a similar description which had been addressed to her by other persons. The husband gave evidence as follows:—"I was so much hurt that after consideration I thought they would not have dared to charge her with such foul abuse, that I determined to leave her till the matter was cleared up." On cross-examination he said, *154] "I left her *in consequence of the bad language used by all, more particularly by Mrs. Scott."

It was submitted, on behalf of the defendant, that the words were not actionable without proof of special damage, and that the damage alleged was not sufficient legal damage: that it was not the wife's duty to tell her husband of the slander, and as he only knew it by her repetition without any authority from the slanderer, the action was not maintainable: *Ward v. Weeks*, 7 Bing. 211 (E. C. L. R. vol. 20).

The learned Judge reserved leave to move to enter a verdict for the defendant or a nonsuit; and directed the jury that in order to find a verdict for the plaintiff they must be satisfied that the husband refused to live with his wife in consequence of the slander uttered by the female defendant. The jury found a verdict for the plaintiff, with 40*s.* damages.

Hayes, Serjt., in the following Term, obtained a rule nisi accordingly, on the ground that the alleged special damage did not arise from the speaking of the words by the female defendant, but from the voluntary communication by the female plaintiff to her husband of those words, and of other abusive language; or why the judgment should not be arrested, on the ground that the action was not maintainable, the words not being actionable in themselves, and the alleged special damage not being sufficient legal damage to render the words actionable.

O'Brien and *Cockle* now showed cause.—The authority of *Ward v. Weeks* is not disputed. That case decided that the original utterer of slander is not responsible for damage resulting from an unauthorized repetition of it by a third person. But here the slander was addressed to a person whose duty it was to inform her husband of it. *155] The case *therefore falls within the principle of *Kendillon v. Maltby*, Car. & Marsh. 402,† where a police officer was dismissed by the Commissioners, in consequence of a report duly made to them of a censure uttered on him by a magistrate acting in his judicial capacity; and it was held that, in the absence of malice, no action would lie against the magistrate, for it was his duty to express his opinion of the conduct of police officers. [WILDE, B.—Is it the duty of a wife to communicate to her husband any vulgar abuse addressed to her?] Here there was an imputation of adultery, which it was the duty of the wife to communicate to her husband, for it affected not only her reputation but himself also; and therefore he had an interest in ascertaining whether it was true. The consequences might have been more serious if the slander had reached him from another source. [MARTIN, B.—The question is whether the alleged damage was the natural consequence of the slander. No *legal* wrong was done at the time the words were spoken.]—Secondly, there was sufficient special damage to render the action maintainable. In consequence of the slander the husband refused to cohabit with his wife.

[MARTIN, B.—This question was lately before the House of Lords in a case of *Lynch v. Knight*, Dom. Proc. July 17, 1861.] There no actual adultery was imputed to the wife, and on that ground it was held that the loss of the husband's consortium was too remote a damage to support the action. [MARTIN, B.—Was the husband justified in refusing to cohabit with his wife?] That is immaterial: it is sufficient if the special damage is the natural and probable consequence of the slander. [BRAMWELL, B.—Suppose a person said something to a master about his servant, in consequence of which the master dismissed him, would an action lie against that person?] According to *Lumley v. Gye*, 2 E. & B. 216 (E. C. L. R. vol. 75), wherever, either from the relation between the parties or by express contract, *a [*156 right accrues to one party and a duty is imposed on the other, any wrongful act which prevents the performance of that duty affords a ground of action. Upon that principle actions for criminal conversation and seduction were founded; because a husband has a right to the consortium of his wife and a master to the servitium of his servant. *Wilton v. Webster*, 7 C. & P. 198 (E. C. L. R. vol. 32), shows the nature of the loss of consortium which affords ground of damage. [BRAMWELL, B.—In *Hall v. Wright*, E. B. & E. 746 (E. C. L. R. vol. 96), Lord Campbell considered that supervening bodily infirmity did not put an end to a contract of marriage. MARTIN, B.—In *Moore v. Meagher*, 1 Taunt. 39, it was held that the loss of hospitality of friends was a sufficient temporal damage whereon to maintain an action.] It is conceded that a wife has no right of action for the false imprisonment of her husband, whereby she lost his consortium, but there a wrong is done to the husband for which he may recover damages. Where slanderous words are spoken of a wife a damage ensues to her. [WILDE, B.—If words are spoken of a person which injure his character, is he bound to communicate them to all his friends; and could he recover damages for every friend he lost? With regard to a servant, the wrongful act prevents the performance of a duty. MARTIN, B.—In the case of a servant, the foundation of the action is that the master is deprived of that species of property which he has in the service of his servant.] If the slander came to the knowledge of the husband from some other source, the wife's condition would be worse from having refrained to communicate it.—They also referred to *Lynch v. Knight*, Dom. Proc. July 17, 1861.

Hayes, Serjt., and *Field*, in support of the rule.—If this action is maintainable, any slanderous words spoken to a sister, a brother, or any other relation, though not actionable *in themselves might be rendered actionable by reason of their repetition of them. A [*157 woman, in a quarrel with a neighbour, might have offensive language addressed to her, and upon repeating it to her husband, he might refuse to cohabit with her, and so create a cause of action. If it is the duty of a wife to communicate to her husband slander uttered against her, it is equally the duty of a husband to communicate to his wife slander uttered against him. By exercising this supposed moral duty actions for slander might be indefinitely multiplied. If a person said of a tradesman that he used false weights and he told that to a customer, who in consequence ceased to deal with him, could the tradesman maintain an action? The true principle is thus stated by

Tindal, C. J., in *Ward v. Weeks*, 7 Bing. 211, 215 (E. C. L. R. vol. 20):—"Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words." Moreover, the special damage was not the necessary and legal consequence of the slander. *Allsop v. Allsop*, 5 H. & N. 534,† was an action by husband and wife for slander imputing incontinency to the wife, by reason whereof she became ill, and was unable to attend to her necessary affairs and business, and her husband was put to expense in endeavouring to cure her; and it was held that the action was not maintainable. Pollock, C. B., there said:—"We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it." In *Lynch v. Knight*, Lord Wensleydale was of opinion that a wife has no right of action for the loss of the consortium of her husband, in consequence of the slander of her character.—They also referred to *Vicars v. Wilcocks*, 8 East 1.

*158] *POLLOCK, C. B.—I am of opinion that the rule ought to be absolute to enter a nonsuit. I cannot help expressing regret that we should have to discuss such a matter where the words can scarcely be called slander, but are rather mere vulgar abuse, the result of ill-temper and bad manners. The point, however, having been reserved for our consideration, we must dispose of it. The authority of *Ward v. Weeks*, 7 Bing. 211 (E. C. L. R. vol. 20), is not disputed; and I am not disposed to say more than is necessary to get a safe resting-place for a decision. *Ward v. Weeks* decided that where the words are not actionable per se the original utterer of the slander is not liable, unless either the person who was influenced by them was present and heard them spoken, or the utterer authorized their repetition. It is said that in consequence of the slander the husband deprived the wife of his consortium. I do not stop to inquire whether he was justified in so doing, because the slander was not uttered in his presence, nor was it communicated to him by authority of the defendant. Therefore on the authority of *Ward v. Weeks* the rule must be absolute.

MARTIN, B.—I am of the same opinion. We could not discharge this rule without acting contrary to the law as laid down in *Ward v. Weeks*; and if that decision is to be overruled it must be done by a Court of error. I agree with the observation of Lord Campbell in *Lynch v. Knight*,(a) that the law on this subject is in a very unsatisfactory state; and if the matter were de novo, I might express a different opinion, but I think we are bound by the authority of *Ward v. Weeks*.

BRAMWELL, B.—I am also of opinion that the rule ought to be absolute. I rest my judgment entirely on the case of **Ward v. Weeks*. If a man makes a slanderous statement to another, and he thinks fit to communicate it to a third person, it is not reasonable to hold that the first speaker is responsible for the ultimate consequences. If I make a slanderous statement to a man, and do not desire nor authorize him to repeat it, but nevertheless he does so, he

(a) The judgment of the late Lord Campbell was read by Lord Brougham.

ought to do it upon his own responsibility, and I ought not to be liable for the consequences of his wrongful act. Mr. *O'Brien* contends that the repetition of the slander to the husband was the natural and inevitable consequence of uttering it; and that it was the duty of the wife to communicate it to her husband. I think not; and, without going more fully into the matter, it seems to me that *Ward v. Weeks* is an authority in point.

WILDE, B.—I am of the same opinion. It seems to me that the rule laid down in *Ward v. Weeks* is the true rule. It is attempted to distinguish that case from the present, on the ground that there the person who heard the slander was under no obligation to repeat it. But the Court decided that case on this principle, that the person who brings an action of slander must be the person who heard it uttered, or to whom it has been communicated by the authority of the original utterer. It would be a dangerous innovation if the doctrine contended for were introduced, and it would be difficult to say where the action for slander would stop. The case has been put on the high moral duty of a wife to communicate to her husband any imputations upon her character; but in my opinion there is no obligation whatever on a wife to repeat to her husband whatever is said of her in his absence. In this case the words used were nothing more than a missile in the course of the vulgar abuse of one woman by another.

Rule absolute to enter a nonsuit.

*NASH v. ASH.(a) Jan. 31.

[*160

In 1802, by indenture, reciting an intended marriage between L. and M., and that after the death of certain relations L. was entitled under the will of his uncle to five messuages; in consideration of the intended marriage, and of 5s. paid, L. granted, bargained, sold, assigned, and set over unto R. and J. the reversion, or such other estate as he was entitled to under the will of his uncle, "upon the trusts and to and for the uses" thereafter declared, i. e. upon trust to "permit and suffer M." and her assigns, during her life, to receive the issues and profits for her sole use, her receipts alone to be sufficient discharges for the same; and after her death in trust for L.; and after the decease of the survivor, in trust for such one or more of the children of L. and M. as they should by deed jointly appoint. In 1829, L. and M., by deed, executed the power, and granted, bargained, sold, and released the reversion in the messuages to such uses as P., their son, should by deed appoint. In 1839, P., by deed, conveyed the reversion to N. M. received the rents during her life, and L. after her death. No rent was received by P. or N. In ejectment by N.:—Held: First, that the deed of 1802 was admissible in evidence against the defendant, although neither P. nor the plaintiff had been in receipt of the rents.

Secondly, that the trusts of the deed of 1802 were executed by the statute (with the exception, perhaps, of that for the wife), and therefore P. took a legal estate by the appointment under the deed of 1829.

Thirdly, that the deed of 1802 was not a bargain and sale properly so called, but a conveyance to uses.

EJECTMENT to recover three messuages, situate at Stoke-upon Trent, in the county of Stafford.

At the trial, before Hill, J., at the Stafford Summer Assizes, 1861, the following facts appeared:—By indenture of the 5th May, 1802, between Philip Francis Lycett of the first part, Mary Jenks of the second part, and Richard Lane and John Lycett of the third part. after reciting that a marriage was intended between Philip Francis

(a) Decided in Hilary Term.

Lycett and Mary Jenks, &c., and that Philip Francis Lycett was entitled, after the decease of his aunt Sarah Lycett, deceased, his uncle John Lycett, and his cousin Mary Lycett, now Mary Walker, as the nephew and devisee named in the last will and testament of his uncle Philip Lycett, deceased, to five messuages situate near Milford Gate, Stoke-upon-Trent: It was witnessed that, in consideration of the intended marriage, &c., and of 5s. paid by Richard Lane and John Lycett to Philip Francis Lycett, &c., Philip Francis Lycett doth grant, bargain, sell, assign, and set over unto the said Richard and John Lycett, their heirs, executors, administrators, and assigns, all that the *161] *reversion or remainder, or such other estate, right, and interest to which he the said Francis Lycett is entitled under and by virtue of the will of the said Philip Lycett, deceased, of, in, and to all those five messuages, &c., upon the trusts and for the uses, ends, intents, and purposes hereinafter mentioned, expressed, and declared, that is to say, in trust for Philip Francis Lycett, his heirs, &c., until the marriage, and then in trust to permit and suffer the said Mary, his intended wife, and her assigns, during her natural life, and notwithstanding her coverture, to receive and take the issues and profits thereof to and for her and their own sole and separate use, free from the debts, control, or engagements of Philip Francis Lycett, and her receipts alone, notwithstanding her coverture, to be good and sufficient discharges for the same: and after her decease, in trust for Philip Francis Lycett and his assigns for life, without impeachment of waste: and after the decease of the survivor, in trust for all and every, or such one or more of the child or children, whether sons or daughters, of the said Philip Francis Lycett on the body of the said Mary his wife lawfully to be gotten, for such estates and in such parts and proportions, and charged with such annual sums, and in such manner as they the said Philip Francis Lycett and Mary his intended wife, during their joint lives, should by any deed appoint. (Then followed limitations in default of such appointment.)*

By indenture of the 22d of April, 1829, between Philip Francis Lycett and Mary, his wife (formerly Mary Jenks), of the first part, Francis Lycett (one of the sons of the said Philip Francis Lycett and Mary, his wife), of the second part, and John Lycett of the third part: after reciting the indenture of the 5th May, 1802, and that by it the reversion, remainder, or such other estate, right, or interest which Philip Francis Lycett has in the said messuages, was granted and *162] assured to the said Richard Lane and John Lycett upon *the trusts* and for the ends, intents, and purposes therein mentioned: also reciting that Philip Francis Lycett and Mary, his wife, had issue three children, and were desirous of exercising the power of appointment vested in them by the settlement, &c., in favour of their son Francis Lycett: It was witnessed that Philip Francis Lycett and Mary, his wife, for good causes and considerations, and by virtue of and in exercise and execution of the power and authority jointly limited to them by the recited indenture, and every other power, have, and each of them hath, directed, limited, and appointed, and do and doth irrevocably direct, limit, and appoint that after the decease of the survivor of them, the said Philip Francis Lycett and Mary, his wife the said messuages, &c., shall be and enure to and for the uses, intents,

and purposes hereinafter declared. And the said Philip Francis Lycett and Mary, his wife, do hereby grant, *bargain, sell*, and release unto the said Francis Lycett, his heirs, &c., the said five messuages, &c., and all other hereditaments and premises mentioned in the indenture of the 5th May, 1802, and the reversion and reversions thereof, and all the estate, &c.: Habendum to Francis Lycett, his heirs and assigns, in remainder immediately expectant upon the decease of the survivor of them, the said Philip Francis Lycett and Mary, his wife. Declaration: that the limitation, appointment, grant, and release aforesaid shall remain, and the indenture of the 5th May, 1802, shall operate and enure, and every person seised of the said messuages shall be seised thereof (after the death of the survivor of them, the said Philip Francis Lycett and Mary, his wife), *to such uses* and for such trusts and purposes, and subject to such powers *as the said Francis Lycett by deed shall appoint*; and in the mean time, and in default thereof, to the use of Francis Lycett and his assigns for life; and on the determination of that estate in his lifetime, to the use of John Lycett, his executors, &c., during the life of Francis Lycett, in trust for *Francis Lycett and his assigns; and after the determination of the estate of the said John Lycett, to the only use of Francis [*163 Lycett in fee.

By indenture of the 15th January, 1839, between Francis Lycett of the first part, Goodwin Nash of the second part, and George Vernon of the third part: after reciting the indenture of the 22d April, 1829, and a contract for the absolute sale by Francis Lycett to G. Nash of the said five messuages, subject to the life estate of Philip Francis Lycett and Mary, his wife: It was witnessed that, in consideration of 150*l.*, Francis Lycett (in execution of the power contained in the indenture of the 22d April, 1829) appoints, that the said five messuages, &c., and all other messuages and other hereditaments and premises mentioned in the indenture of the 22d April, 1829, and the reversion, &c., and all deeds concerning the same, &c., shall operate and enure (subject to the estate of Philip Francis Lycett and Mary, his wife, therein) to such uses as G. Nash by deed shall appoint, and in default of such appointment, to the use of G. Nash for life, and on the determination of that estate in his lifetime, to the use of G. Vernon during the life of G. Nash, and on the determination of that estate, to the use of G. Nash, his heirs and assigns.

The plaintiff proved the receipt of rent by the wife of Philip Francis Lycett in her lifetime, and the receipt of rent by him after her death. Philip Francis Lycett died in 1841, and there was no evidence of the receipt of rent by Francis Lycett or the plaintiff. The will of Philip Lycett, the uncle of Philip Francis Lycett, was not in evidence, nor was it proved that the life estates had expired.

It was objected, on behalf of the defendant, first, that the indenture of the 5th May, 1803, was not admissible in evidence against the defendant, because there was no proof of the possession of Philip Lycett or the plaintiff under it, and *that, even if it was admissible, it did not show the nature of the reversion, and therefore [*164 the will of Philip Lycett should have been given in evidence. Secondly, that under that indenture, the legal estate in the reversion vested in the trustees, so that the plaintiff had an equitable interest

only. Thirdly, that the indenture was a bargain of sale, and void for want of enrolment.

The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Matthews, in the following Term, obtained a rule nisi accordingly, on the grounds that there was no sufficient evidence to support the verdict for the plaintiff, and that the several deeds, and the evidence given for the plaintiff, failed to show the legal estate in him.

Pigott, Serjt., and *Gray* now showed cause.—First, the indenture of the 5th May, 1802, was admissible in evidence against the defendant. Philip Francis Lycett and his wife had received the rents of the premises in question under that deed. It is not necessary that the plaintiff should show possession by him; as soon as it appeared that some parties through whom he claimed had possession under the deed, it became evidence against all persons.

Secondly, the legal estate in the reversion in fee vested in the plaintiff. Under the indenture of the 5th May, 1802, the uses were executed in the cestui que trusts. The reversion is not conveyed to the trustees and their heirs to the use of the trustees and their heirs, but to the trustees and their heirs upon the trusts and for the uses therein-after mentioned: *Hayes on Conveyancing*, p. 53, 5th ed., *Williams v. Waters*, 14 M. & W. 166.† Therefore Francis Lycett had a legal *165] estate in the reversion under the appointment of the 22d *April, 1829; and he conveyed it to the plaintiff by the indenture of the 15th January, 1839.

Thirdly, the indenture of the 5th May, 1802, was not a bargain and sale, but a conveyance to uses. The words "bargain and sell," do not render it a bargain and sale properly so called. It is clear, upon the face of it, that the parties never intended that it should operate as a bargain and sale. If it can operate in either way, the Court will put that construction upon it which will support it.

Matthews, in support of the rule.—To entitle the plaintiff to recover, he must establish that he had a legal estate in the reversion in fee. For that purpose he relied on the three indentures of the 5th May, 1802, the 22d April, 1829, and the 15th January, 1839. The indenture of the 5th May, 1802, recites that Philip Francis Lycett was entitled after the decease of certain of his relatives, as devisee under the will of his uncle, to five messuages, but it does not state the nature of his interest. It was not proved that the life estates had expired, nor was the will of the uncle produced; so that there was no evidence to show what the reversion was. It might be for a limited estate, viz., for life or years, or an equitable reversion. It was contended, however, that the receipt of the rents and profits by Philip Francis Lycett and his wife, coupled with the deed, showed the nature of the reversion. But the deed was not admissible in evidence against the defendant who was a stranger to it. In order to render it admissible, evidence should have been given of the plaintiff's possession under it. Possession is *prima facie* evidence of seisin in fee, and therefore a deed which shows that a person in possession has a life estate, is a declaration against his own interest, and on that ground is admissible *166] in evidence against a stranger: *Taylor on Evidence*, ss. 617, *618; *Doe d. Welsh v. Langfield*, 16 M. & W. 497, 514,† *Crease*

v. Barrett, 1 C. M. & R. 919, 931,† *Doe d. Daniel v. Coulthred*, 7 A. & E. 235, 239 (E. C. L. R. vol. 34). The party making the declaration must be in possession at the time he makes it, otherwise it is not a declaration against his interest. Here it was not shown that the plaintiff was ever in possession, and therefore the principle on which a deed is evidence against strangers does not apply. [POLLOCK, C. B.—If there was at any time a possession consistent with the deed, it is evidence against all persons.]

Secondly, the plaintiff has not a legal estate in the reversion, but an equitable interest only. By the indenture of the 5th May, 1802, the legal estate in the reversion was conveyed to the trustees. In order to carry out the trust for the benefit of the wife of Philip Francis Lycett, free from the control of her husband, it is essentially necessary that the use should be executed in the trustees: *Harton v. Harton*, 7 T. R. 652, *Doe d. Stevens v. Scott*, 4 Bing. 505 (E. C. L. R. vol. 13). Where an estate in fee is limited to trustees by deed, it is not cut down by subsequent limitations: *Colmore v. Tyndall*, 2 Y. & J. 605,† *Wykham v. Wykham*, 11 East 458. The indenture of the 22d April, 1829, does not purport to appoint a reversion in fee, but an equitable estate only; for it recites that by the indenture of the 5th May, 1802, the messuages were granted to the trustees *upon the trusts* therein mentioned. The parties, without pecuniary consideration, “grant, bargain, sell, and release” the premises, which only conveys an equitable estate in possession. In order to raise a use which the statute will turn into possession, “it is necessary there should be first one person seised to the use of another in *esse*; and secondly, a use in *esse*.” Sugden on Powers, p. 9, 8th ed. The *use being [*167 executed in the trustees under the indenture of 1802, the uses created by the indenture of 1829 are trusts only.

Thirdly, the indenture of 1802 is not a conveyance to uses, but a bargain and sale, inasmuch as the operative words are “bargain,” “sell,” and it is founded on a pecuniary consideration. A bargain and sale raises a use in the bargainee, and therefore the uses which are declared cannot take effect, otherwise there would be a use upon a use. A bargain and sale is void for want of enrolment.

MARTIN, B.—I am of opinion that the rule ought to be discharged. Three objections have been made. First, it is said that the indenture of the 5th May, 1802, is not admissible in evidence against the defendant. I am at a loss to see why it is not. When a title to land is required to be proved, it is necessary to show possession on the part of some one, but when that is done, a deed may be given in evidence for the purpose of showing what interests are carved out of the estate in fee. Indeed, it is essential, for the law requires that conveyances of lands shall be in writing.

Secondly, it was argued that a legal estate in the reversion in fee did not pass to the plaintiff, but an equitable interest only. No doubt, if that could have been established, it would have been a fatal objection to the plaintiff recovering. But what Mr. Gray has said is correct. The indenture of 1802 is a conveyance to trustees *for the use* of certain persons, and the use is executed in those persons. There might be a legal estate in the trustees during the life of the wife,(a)

(a) See 2 Wms. Saund. 11 b, note (c); 11 g, note (c).

if it were necessary, to secure the profits for her sole and separate use; that she should have an equitable *interest only; but the *168] other uses would nevertheless be executed.

Thirdly, it was argued that the indenture of 1802 is a bargain and sale, and therefore void for want of enrolment. But it is not a bargain and sale in this sense. At common law a reversion might have been granted by deed without livery of seisin. A bargain and sale of freehold land is a conveyance of a peculiar character, which operates by virtue of the Statute of Uses. Upon a bargain and sale, properly so called, uses cannot be limited upon the legal estate of the bargainee except in the case of a rent-charge, for the reason given by Lord Coke, Co. Lit. 272 *a*, viz., that upon a bargain and sale there is a use executed by the statute in the bargainee, and there cannot be a use upon a use. But where there is a conveyance of a reversion at common law, there is no reason, because the words "bargain and sell" are introduced, why there should not be a limitation to uses; and as observed in *Gilbertson v. Richards*, 4 H. & N. 277, 296,† "in order to create a use no technical words are necessary; and it is only essential to show that the intention was that the party should have the interest or estate; that regard is to be had to the mind and intention of the parties; and whatever may be the words, the interest will operate according to the effect which the parties intend to give it." In my opinion, therefore, the legal estate in the reversion passed under the limitations in the deed of 1802, with the exception, perhaps, of that to the wife. I should have been very sorry if it were otherwise, and that the plain intention of the parties should have been defeated by a technical objection.

*169] CHANNELL, B.—I am also of opinion that the rule should be discharged. The defendant is in possession of the land, and this action is brought to recover from him that possession. The question then is, whether the documentary title of the plaintiff will operate against the defendant's possession. That depends on whether the plaintiff has shown a legal estate in himself. I am of opinion that the legal estate in fee in the reversion passed to the plaintiff. I think that the deed of 1802 operated by way of grant, not as a bargain and sale, and that under the deed of 1829 the legal estate in the reversion in fee was appointed to such uses as Francis Lycett should appoint, and by the deed of 1839 he conveyed it to the plaintiff.

It is said that the deed of 1802 was not admissible in evidence against the defendant, who is a stranger; but I think that where there is a long deduction of title, it is not necessary to show a receipt of rent by each individual who was entitled under a deed. It is enough to show a possession by some person through whom the party claims. Then was there in this case at any time such a possession of the land or receipt of rent as would give the plaintiff a title under these deeds? I think there was not only evidence to go to the jury sufficient to let in the deed of 1802, but also to create a title against the defendant.

WILDE, B., concurred.

POLLOCK, C. B.—So far as I heard the argument, I think the rule ought to be discharged. Rule discharged.

*ATKINSON v. WOODHALL. *May 3.* [*170

No action at law can be maintained by a seaman for his share of salvage awarded by two justices, under the 17 & 18 Vict. c. 104, s. 460, and paid to the owner of the salvor vessel.

The owner of a vessel, to whom the aggregate amount of salvage had been paid, offered a seaman less than he claimed as his share, which the seaman refused:—Held, no evidence of money received to the seaman's use, or of an account stated.

DECLARATION.—For money had and received; and on accounts stated.

Plea.—Never indebted.

At the trial, before the Secondary of London, it appeared that the plaintiff, who was a seaman, had been engaged as mate on board a ship of which the defendant was owner, and that in consequence of one of the men being dismissed, he did extra work as a seaman. During the time of the plaintiff's engagement a disabled vessel was towed into harbour by the defendant's ship, and two justices awarded (under the 17 & 18 Vict. c. 104, s. 460) to the owner, captain, and crew, 60*l.* as salvage, to be paid to the owner. The costs were apportioned and paid, but the proportions in which the 60*l.* salvage was to be divided were not fixed by the justices. The plaintiff claimed 17*l.* as his share of the salvage. The plaintiff gave in evidence a letter from the defendant in which he admitted that he had received the 60*l.* salvage-money, and offered 6*l.* 13*s.* 4*d.* to the plaintiff as his share, which the plaintiff refused.

It was submitted on behalf of the defendant that an action for a share of salvage-money was not maintainable in a Court of common law. The Secondary was of that opinion, and directed a verdict for the defendant.

Joyce, now moved for a new trial on the ground of misdirection.—It should have been left to the jury to say how much the plaintiff was entitled to recover. The letter of *the defendant is evidence [*171 that he has received the plaintiff's share of the salvage-money as his agent and for his use. [POLLOCK, C. B.—How can an action by one of the crew for his share of salvage-money be maintained in a Court of law? One seaman might obtain from one jury one sum, and another might obtain from another jury a totally different sum. WILDE, B.—I never heard of an action in a Court of law for a share of salvage-money. What is the principle which the Judge is to lay down and by which the jury are to be guided?] The money having been paid to the owner, it is no longer salvage-money, but money received by him for the use of the persons entitled to it. [POLLOCK, C. B.—In the case of *The Columbine*, 2 W. Rob. Adm. Rep. 186, where a tender of 600*l.* had been accepted by the salvors, the Court of Admiralty directed the proportion to be paid to each vessel, and the precise sum to be paid to each of the crew.] Here the salvage-money is less than 200*l.*, and therefore the claim must be referred to the arbitration of two justices, under the 460th section of the 17 & 18 Vict., c. 104; but that Act contains no provision enabling them to apportion the amount among the crew. Where the salvage-money exceeds 200*l.*, the 498th section requires it to be apportioned by a Court of Admiralty. [WILDE, B.—The justices have not performed

the whole of the functions which belonged to them. It was, no doubt, intended that they should have the same power of apportionment as a Court of Admiralty where the salvage-money exceeds 200*l*. It is true the Act does not say so in express terms, but the 462d section enables them to apportion the costs of the arbitration. How is it that 17*l*. is claimed as the plaintiff's proportion of the salvage-money? He acted both as mate and man. [WILDE, B.—The 466th section provides that whenever the aggregate amount of salvage has *172] been finally ascertained, either by agreement or the award *of justices, but a dispute arises as to the apportionment thereof among the claimants, if the amount does not exceed 200*l*., the party liable to pay it may pay it to the receiver of the district. Then, by the 467th section, the receiver is required to distribute it among the persons entitled thereto, in such shares and proportions as he thinks fit.] If the money was in the hands of the receiver, the plaintiff might avail himself of that enactment, but it cannot apply to this case, because the party liable to pay the salvage has paid it to the defendant. [WILDE, B.—Taking the 466th, 467th, and 468th sections, together with the instructions issued by the Board of Trade to the receivers of wrecks with reference to the apportionment of salvage (which will be found in Maude and Pollock's Law of Merchant Shipping, p. 433, note (k), 2d ed.), it is evident that this case is provided for.]

POLLOCK, C. B.—There ought to be no rule. Looking at the Act of Parliament, I am clearly of opinion that this case is provided for, and that no action at law can be maintained which calls upon a jury to apportion salvage-money among the several members of a crew.

Mr. *Joyce* relied upon a letter of the defendant as evidence which entitled the plaintiff to recover. But it turned out that the offer contained in that letter was not accepted by the plaintiff, so that if the case had been left to the jury and they had found a verdict for him, they would have come to a different conclusion from himself as to what he was entitled to for salvage. If the plaintiff had agreed to accept the sum offered, it may be that he might have recovered it as money had and received for his use or on an account stated.

WILDE, B.—I am of the same opinion. The apportionment of salvage is essentially a matter of admiralty *jurisdiction. Mr. *173] *Joyce* had cited no text-book or authority in support of his proposition, that an action at law can be maintained by a seaman for his share of salvage. Great mischief would ensue if such questions were withdrawn from the rules adopted by Courts of Admiralty and submitted to a jury. It is not true that there are no provisions in the 17 & 18 Vict. c. 104, for the division of salvage-money where it does not exceed 200*l*. The sections of the Act to which I have referred, taken in connection with the instructions issued by the Board of Trade, are sufficient to meet every case. But whatever difficulty the plaintiff might have in enforcing his claim, I should require some authority for holding that such an action could be maintained in a Court of law.

As to the defendant's offer to pay the plaintiff 6*l*. 13*s*. 4*d*., my Lord has already pointed out that it was not accepted; if it had been, the case might have been different. Rule refused.(a)

(a) Martin, B., and Channell, B., were not present.

EASTER VACATION, 25 VICT. 1862.

IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

DURRELL v. EVANS and Others. May 17.

The plaintiff, a hop-grower, having sent samples of his hops to his factor, the defendant went to the factor and offered to buy some at 16*l.* 16*s.* a cwt. After some negotiation between the defendant, the factor, and the plaintiff, the latter agreed to sell the hops at that price, and the factor wrote in his book, in the presence of the plaintiff and defendant, a memorandum of the bargain in duplicate, one part of which he headed with the name of the defendant and the other part with the name of the plaintiff. The defendant requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. The plaintiff consented, and the alteration was made by the factor, who tore from his book the part of the memorandum headed with the name of the defendant and delivered it to him, and kept the counterfoil in his possession:—Held, that there was evidence for the jury that the factor was the agent of both parties for the purpose of drawing a record of the contract binding on them; and that, if he were, the name of the defendant at the head of that part of the memorandum delivered to him was a sufficient signature by his agent within the 17th section of the Statute of Frauds.

THIS was an appeal from the decision of the Court of Exchequer in setting aside a verdict for the plaintiff and entering a nonsuit. (Reported 6 H. & N. 660.†)

The case on appeal (so far as material) was as follows:—

The first count of the declaration stated that, by an agreement between the plaintiff and the defendants, the plaintiff agreed to sell and deliver to the defendants, and the defendants agreed to buy, accept, and pay the plaintiff for thirty-three pockets of hops at the price of 16*l.* 16*s.* a cwt., to be paid on the 3d November, 1860.—Averment: that the plaintiff did all things necessary, &c., to entitle him to have the defendants buy, accept, and pay for the said hops as agreed.—Breach: that the defendants would not buy, accept, or pay for the same.—The second count was for money payable by the defendants to the plaintiff for goods bargained and sold, &c.

*Pleas (inter alia): to first count.—That the defendants did [*175 not agree as in that count alleged.

To the residue of the declaration—Never indebted.—Issues thereon. The cause was tried before the Lord Chief Baron at the London Sitings after Michaelmas Term, 1860, when a verdict was found for the plaintiff, with 420*l.* damages, leave being reserved to the defendants to enter a verdict for them, or a nonsuit.

The plaintiff is a hop-grower in Kent. The defendants are hop-merchants carrying on business in the borough of Southwark.

Previous to the 19th October, 1860, the plaintiff had sent samples of the hops, forming the subject of this action, to Mr. J. T. and W. Noakes, who carry on business as hop-factors in the said borough

of Southwark, with instructions to sell the same for the plaintiff, but not under 18*l.* per cwt. On Friday (October 19) the defendant, J. C. Evans, called on Messrs. Noakes and asked to see samples of the plaintiff's hops, which were shown to him. Upon asking the price, Mr. J. T. Noakes replied that he was instructed by the plaintiff not to sell under 18*l.* per cwt. The defendant, J. C. Evans, said that was too high a price for them, and he should not give so high a price for them. He then left Messrs. Noakes's premises. On the afternoon of the same day, Friday (October 19), the plaintiff happened to be in the borough, and met the defendant, J. C. Evans; a conversation took place between them with reference to the plaintiff's hops. Mr. J. C. Evans offered the plaintiff 16*l.* 16*s.* per cwt., which the plaintiff refused, but ultimately both parties went to Messrs. Noakes' counting-house and saw Mr. J. T. Noakes on the subject. Some further conversation took place as to the purchase of the hops, which ended in Mr. J. C. *176] *Evans refusing to give any more than 16*l.* 16*s.* per cwt. The plaintiff (in the presence and hearing of Mr. Evans) asked Mr. J. T. Noakes whether he would recommend him (the plaintiff) to accept Mr. Evans's offer. Mr. Noakes advised him to do so, and the plaintiff agreed to sell the hops at that price. Mr. Noakes then wrote out a sale-note in duplicate.

By the custom of the hop trade, hops are payable on the Saturday week following the day of the sale. This transaction took place on Friday, the 19th day of October, and the money would consequently have become payable in due course on Saturday, October the 27th.

The said Mr. Noakes therefore drew out the following memorandum, and dated it the 19th day of October. Whereupon Mr. Evans requested him to alter the date to the 20th, in order that he might have another week's time for payment. The plaintiff and Mr. Noakes consented to this, and the alteration was accordingly made by Mr. Noakes, who then gave the said memorandum so altered to Mr. J. C. Evans, who took the same away with him, and he has never yet returned it. The said memorandum was torn from a book which contained a counterfoil, and which was filled up in the following form and retained by Messrs. Noakes.

The following is a copy of the memorandum first referred to:—

"Messrs. Evans.

"Bought of J. T. and W. Noakes.

'Bags. Pocks. T. Durrell.

"Ryarsh & Addington.

20th

"Octr. 19th, 1860."

} £16. 16*s.*

*177] *The following is a copy of the counterfoil above referred to:—

"Sold to Messrs. Evans.

"Bags. Pocks. T. Durrell.

"Ryarsh & Addington.

20th

"Octr. 19th, 1860."

} £16. 16*s.*

No note or memorandum (except as aforesaid) was signed or given by the defendants or any person on their behalf; nor was there any

writing relating to the said contract except as above set out, and the invoice after mentioned.

A sample of each of the pockets of hops was sent by Messrs. Noakes to the defendants the same evening, and the defendants have ever since retained them and still keep them. In the usual course of business, after the purchase is completed by the factor, an appointment is made between the vendor and the purchaser for the hops to be weighed, for which purpose they are sent by the vendor to his factor's warehouse. In this instance the appointment was made for the following Friday, October the 23d, and on that morning the hops were sent to Messrs. Noakes's warehouse. The warehouseman of the factor generally weighs on behalf of the vendor, and the purchaser either comes himself or sends some one to see them weighed on his behalf. In this case the plaintiff came up to see his hops weighed, and the defendants sent one of their men (James Wenn) to see them weighed for them. Each weigher has a book in which he records the weight of each pocket, and also the excise weight with the number or figure with which each pocket is marked or distinguished. On this occasion the weighing proceeded in the usual course until five pockets had been weighed, when a dispute took place between the weighers, and ultimately the defendants' weigher refused to weigh any *more. The defendant, Robert Percival Evans, came into the warehouse at this time and went to the scale and saw [*178 weighed the pocket that was therein. Having done so he cut it open and took out a portion of the hops and said they were damp. The plaintiff denied that they were damp, but the defendant persisted in his statement and finally said he should not take the hops at all, and left the warehouse with his man.

After the defendant and his weigher left the warehouse, and after such refusal, the plaintiff's weigher completed the weighing, which amounted in the whole to 50 cwt. 0 qrs. 13 lbs. On the 9th day of November, 1860, Messrs. Noakes sent to the defendants an invoice of which the following is a copy:—

"Messrs Evans & Co.		"To J. T. & W. Noakes.		"Borough	
"1860.		cwt.		£	s. d.
"Octr. 20th.	Durell. Bt. 33 Po.	50 0 13	@ 16. 16/	.	841 19 0."

It was stated by Mr. J. Noakes, at the trial, that a day or two after the difference relative to the weighing he had an interview with the defendant, Robert Mendham Evans, at which he requested the said Robert Mendham Evans to send and have the weighing completed, when the defendant, Robert Mendham Evans, promised the said Mr. J. Noakes that he would do so and accept the hops and complete the purchase; but the defendants subsequently refused to do so, and thereupon the plaintiff instructed his attorneys to write and send a letter (of which the following is a copy) to the defendants, which was done.

"37, King William Street,
"London Bridge, 9th November, 1860.

"Sirs,
"We have been consulted by Mr. Durrell, of Banstead, with reference to your refusal to complete your contract for *the purchase of 33 pockets of hops sold to you by Messrs. Noakes on [*179 behalf of our client on the 20th October last.

"We beg to enclose you the delivery order, and are instructed to inform you that the goods remain in Messrs. Noakes's warehouse awaiting your order or disposal, and at your risk and costs; and further, that unless the sum of 841*l.* 19*s.*, being the amount of the invoice already sent you for these hops, be paid to us by 11 o'clock on Monday morning, we shall take immediate proceedings against you for its recovery.

"In the event of your deciding to resist this claim we have to request a reference to your solicitors.

"We are, Sirs,

"Yours obediently,
"INGLE & GOODY."

"Messrs. R. M. Evans & Co.

"George Yard, Borough."

The invoice above referred to has ever since been retained by the defendants.

On the 9th day of November the plaintiff's attorney sent to the defendants in the last-mentioned letter a delivery order.

This delivery order the defendants refused to receive, and it was taken back by the clerk who brought it, and on the same day the defendants returned it.

No part of the said hops (except the samples) has ever been delivered to the defendants.

T. Jones (Waddy with him) now argued for the plaintiff.(a)—There was a sufficient note in writing of the bargain, signed by the agent of the parties to be charged, within the meaning of the 17th section *180] of the Statute of *Frauds. The defendants adopted the act of Noakes, the factor, so as to make him their agent for the purpose of signing the contract. An authority may be presumed from subsequent acts of assent or acquiescence, and a small matter will be *prima facie* of such assent: *Paley on Principal and Agent*, p. 171, 3d ed., *Keating v. Surry*, cited in *Paley on Principal and Agent*, 171, note, 3d ed. [BLACKBURN, J.—That case is differently reported in *Espinasse*: 5 *Esp.* 266, and *Rinitz v. Surry*. If, as there stated, the jury found for the defendant, because the bulk did not correspond with the sample, the question upon the statute never could have arisen.] The question of ratification does not arise, because all the acts were contemporaneous. If the party to be charged recognises his signature made on the note by another person, intending that it shall be his assent to the contract, it is binding on him: *Schneider v. Norris*, 2 *M. & Sel.* 286. [BLACKBURN, J.—There the name of the defendant was printed, and he sent the paper with his printed name upon it to the plaintiffs.] Here there was evidence that the defendants intended that the note, with their name upon it, should be a memorandum of the bargain binding on both parties. [BYLES, J.—The note, with the defendants' name upon it, was delivered immediately after the bargain, the defendants knowing that without a signature by themselves or their agent they would not be bound.] In *Saunderson v. Jackson*, 2 *Bos. & P.* 238, it was held that a subsequent letter written and signed by the vendor, referring to the order, might be connected with a bill of parcels, in which the vendor's name was printed, so as to render it a sufficient note of the bargain within the statute. *Macleay v. Dunn*,

(a) Before Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.

4 Bing. 722 (E. C. L. R. vol. 13), is also an authority that a subsequent *recognition of a contract made by an unauthorized agent will render it binding within the statute. [WILLES, J.— [*181 Might not the jury have found that the conduct of the parties amounted to this: "Put that which is our bargain into a note in writing, which will bind us"? If the jury had so found, would it have been a perverse verdict? MELLOR, J.—Why should the defendants ask to have the date altered if it was not their note?] In *Johnson v. Dodgson*, 2 M. & W. 653,† the buyer merely wrote his name and the terms of the contract in his own book which he kept, and which he got the sellers' agent to sign on their behalf, and that was held a sufficient memorandum within the statute. [CROMPTON, J.—There the defendant wrote his own name. In *Graham v. Musson*, 5 Bing. N. C. 603 (E. C. L. R. vol. 33), where the buyer requested the agent of the seller to write a note of the contract in the buyer's book, which the agent did and signed his own name to it, that was held not a sufficient note of the contract to bind the buyer.] *Graham v. Fretwell*, 3 Man. & G. 368 (E. C. L. R. vol. 42), is an authority to the same effect; but in those cases the name of the party to be charged did not appear on the contract, and there was no evidence that the agent of the seller had authority to act as agent of the buyer. This case falls within the principle of the decision in *Bird v. Boulter*, 4 B. & Adol. 443 (E. C. L. R. vol. 24), where an auctioneer's clerk, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him made an entry accordingly in a book, and that was held a sufficient memorandum within the statute.

Lush, for the defendants.—This is not the case of a sale by a broker who acts as agent of both parties; Messrs. Noakes were the agents of the plaintiff alone. Moreover, Messrs. Noakes were factors, not brokers. The document which they wrote out was merely an invoice debiting the *buyers. [BLACKBURN, J.—The document was [*182 a contemporaneous note of the bargain. An invoice was afterwards sent to the defendants.] It was never intended that the counterfoil should be handed to the sellers; all that was done by Messrs. Noakes was done as factors of the sellers. There is no evidence that Messrs. Noakes acted as agents of the defendants. The question is, not whether the defendants accepted the document as a true record of the contract, but whether their name was written by a person authorized to bind them. [CROMPTON, J.—This was a contemporaneous memorandum which both parties meant to be the contract.] There may be a writing containing the terms of the bargain which is not a note or memorandum within the statute. For instance (as in the case put by Wilde, B., in the Court below), if a person went into a shop and purchased goods above the value of 10*l.*, and said to the shopman, "Make an invoice of the goods," and he did it, and signed the purchaser's name to it, that would not bind him as a memorandum of the contract signed by his agent. In *Graham v. Musson*, 5 Bing. N. C. 603 (E. C. L. R. vol. 35), there was every essential of a contract. It is true that the defendant's name did not appear on the note, but there were the names of the plaintiff and the agent; and it is clear that a signature by an agent, on behalf of his principal, will satisfy the statute. The ground of that decision applies to this case, viz., that

there was no evidence that the seller's agent had authority to act as agent of the buyer. [BYLES, J.—There the buyer merely said to the agent, "Write in my book a note of the contract which will bind your principal." What was wanting in that case is supplied in this. There are cross-documents, and the defendant takes one knowing that it binds the plaintiff, and also knowing the law, as he must be taken to do, that the signature of himself or his agent is necessary in order to bind him.] If *the factor, instead of writing the contract in *183] his own book, had written it in the defendants' book, that would not have made him the agent of the defendants for the purpose of binding them by his signature. At what point did he become their agent? [BLACKBURN, J.—In *Graham v. Musson*, the judgment of Coltman, J., proceeds on the ground that the name of the buyer did not appear on the note; here the defendant's name was written on the note.] It was not written by themselves, nor was it the signature of an agent authorized to bind them by signing their name; but it was a mere designation at the head of an invoice of the party who bought the goods. *Graham v. Fretwell*, 3 Man. & G. 368 (E. C. L. R. vol. 42), is a strong authority in the defendants' favour. There the buyer made an entry of the contract in his book, and the seller's agent, at the request and in the presence of the buyer, signed the entry so made. Here the transaction was nothing more than writing out an invoice and delivering it to the buyer. *Saunderson v. Jackson*, 2 Bos. & P. 238, and *Schneider v. Norris*, 2 M. & Sel. 286, are very different from the present case. In both those cases the name of the seller was printed on the bill of parcels which was delivered to the buyer at the time of the sale, and it was considered that the seller, by filling up the bill of parcels, adopted the printed name as his signature. In *Saunderson v. Jackson*, Lord Eldon said:—"The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name." And in *Schneider v. Norris*, Lord Ellenborough said:—"Here there is a signing by the party to be charged by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written *Norris & Co.* with *184] *his own hand." In *Johnson v. Dodgson*, 2 M. & W. 653,† the memorandum was in the defendant's handwriting and contained his name, and he meant to be bound by it as a complete contract. In *Bird v. Boulter*, 4 B. & Adol. 443 (E. C. L. R. vol. 24), the signature was by the clerk of an auctioneer, who is the recognised agent of both parties. In *Farebrother v. Simmons*, 5 B. & Ald. 333 (E. C. L. R. vol. 5), the auctioneer, by suing on the contract, placed himself in the position of a contracting party, and therefore could not use his signature. [CROMPTON, J.—The signature of an auctioneer or broker is sufficient because they are persons deputed by the parties to make a contract for them; then the question is whether Messrs. Noakes were not requested by the plaintiff and defendants to make a good contract between them.] Auctioneers and brokers make the contract for the principals, who do not come together; and they have an implied authority to make it binding on both parties by signing

their names; but here the defendants were present and making the contract on their own behalf, while Messrs. Noakes acted for the plaintiff. If this paper had been intended to be a binding note of the contract, it would not have been handed to the defendants. [BLACKBURN, J.—In *Johnson v. Dobson*, the memorandum of the bargain was in the buyer's book, which he kept.] The asking for an alteration in the date was merely asking for an extension of credit, and would not constitute the factor the agent of the buyer for the purpose of signing his name. It is merely the case of a person going into a shop and purchasing goods, and upon an invoice being handed to him with one month's credit he asks for two, and the invoice is altered accordingly. In that case, the purchaser could not be said to have made the shopman his agent to contract on his behalf.

Jones replied.

*CROMPTON, J.—This case comes before us on an appeal against a rule to enter a nonsuit; and we have to see whether [*185 there was evidence for the jury sufficient to sustain a verdict for the plaintiff. If there was no evidence for the jury, the nonsuit must stand.

I confess that I was, at first, much struck with the observation of my brother Wilde, as reported in the Court below, in which he likened this case to an invoice, and a purchaser's asking to have the invoice altered. But, on more mature consideration, I cannot agree with that view. I think there was abundant evidence for the jury that the writing was not intended to be an invoice, and I think there was some evidence from which the jury might have found that Noakes was an agent for the purpose of making a record of a contract binding on both parties.

The facts are these:—The plaintiff having sent samples of hops to Messrs. Noakes, his hop factors, with instructions to sell them for him, but not under a certain price, the defendant J. Evans called at Noakes's office and looked at them, but declined to give the price which they asked. Subsequently, on the same day, he saw the plaintiff and offered him a reduced price for his hops, which the plaintiff refused, and ultimately both parties went together to Noakes's office, and there a dealing for the hops ensued, in the course of which the plaintiff, in the presence and hearing of the defendant, J. Evans, asked Noakes whether he would recommend him (the plaintiff) to accept Evans's offer. Noakes advised him to do so, to which the plaintiff agreed, and thereupon Noakes proceeded to make out a contract, in duplicate, the one part being in the nature of a "bought note" and the other part a "sold note." One part was handed to the defendant J. Evans, at all events he saw it, and a jury might say, upon the facts, that he adopted it, for, finding the date of the note to be Friday, the 19th October, and *that according to the custom of the hop trade [*186 the purchase-money for the hops would be payable on the succeeding Saturday week, the 27th, the defendant J. Evans, in order to have an additional week's time for the payment of the money, requested Noakes to alter the date to the 20th October. This alteration was accordingly made by Noakes in the defendant's presence, and the sold note, so altered, was then delivered by Noakes to J. Evans, who took it away with him. These facts show that the

defendant J. Evans really intended that a binding record of the contract between the defendants and the plaintiff should be made by Noakes; and, if so, Noakes was the agent of both parties for the purpose of making it.

Then comes the question whether Noakes did make a binding contract, and whether this document is right in form. And here, again, what are the facts? Noakes drew out a note of the contract with the names of both buyer and seller upon it, but it contained nothing which could ordinarily be called a signature, for the defendant's name was written at the head of the document; and, if this had been the first case on the subject, I should have doubted whether the placing a name at the top of a document could fairly be called a signature; but that is now past discussion, for the cases have decided that it does not signify where the name is placed, if it is put there by the party sought to be charged or some person deputed by him. It may be at the head, in the middle, at the end, or in any part of the document. In *Schneider v. Norris* the putting the name on the note was the act of the party himself, and it is the same when it is the act of his agent.* The present case, however, seems to me to range itself rather within that of *Johnson v. Dodgson*, and the class of cases there cited. Parke, B., there said: "I think this was a sufficient memorandum in writing. The *defendant's name was contained in it in his *187] own handwriting, and it was signed by the plaintiffs. The point is in effect decided by the cases of *Saunderson v. Jackson* and *Schneider v. Norris*. There the bills of parcels were held to be a sufficient memorandum in writing, it being proved that they were recognised by being handed over to the other party. That is amply sufficient to show he meant it to be a memorandum of the contract between the parties." That seems to me identical with this case, assuming the agency to be proved. In that case the party never signed his name, meaning that it should be a signature within the Statute of Frauds, any more than, according to Mr. *Lush*, the defendants did in this case, but it was held to be his signature, since he intended his name to be there. In *Johnson v. Dodgson*, Lord Abinger said:—"But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being the note in writing showing the terms of the contract, and recognised by him." That expressly applies to the present case. If the parties meant the writing to be a memorandum of their contract, it is binding on them. Here is a document on which the name "Messrs. Evans and Co." is written by a factor who was appointed to make a binding contract between the parties, and he makes a memorandum containing the names of the buyer and seller, and the terms of the contract. It is true that the words "Messrs. Evans" were not written by the defendant J. Evans, but he saw the document with "Messrs. Evans" on it, and he requested that an alteration might be made, and thereby recognised it as a record of the contract. Therefore the case is not different in principle from *Johnson v. Dodgson*, for, assuming there was evidence that Noakes was the party intended to make a binding contract on behalf of both buyer and seller, he would have authority to put the defendants' signature.

*I do not agree with Mr. *Lush* that the person signing must put the signature, intending to make a binding contract within the Statute of Frauds. When once it is established that he is a party deputed to make a binding contract, any signature by him is sufficient. If Noakes had formally signed one part of the memorandum with the name of "Evans & Co." and the other with the name "Durrell," he would have had authority to do so; and it is sufficient if the party signing is agent to make the signature, although there was no express idea at the time that it should be a signature within the Statute of Frauds. [*188]

Graham v. Musson had some weight with me at first, but it is not so like the present case as *Johnson v. Dodgson*. *Graham v. Musson* turned upon the nature of the signature. The seller's agent made in the buyer's book an entry of the contract, in which the seller's name was at the top, and the agent signed his own name at the bottom. He was not the agent of the buyer; and in signing his own name he only bound his principal. If he had signed the buyer's name, at his request, the case might have fallen within the authority of *Bird v. Boulter*. I should have thought that there was some evidence to go to the jury as to what his authority was. *Bird v. Boulter* is in the plaintiff's favour. There it was held that the auctioneer's clerk was impliedly authorized by both parties to make a binding contract for them, merely from the surrounding circumstances, and that the writing by him of the name of the purchaser was a sufficient signature, although the purchaser never intended to give him a distinct authority to make a signature binding under the statute. The cases of an auctioneer and a broker show the principle. When a person is in such a situation that, by the usage of trade or the necessity of the case, he has an implied authority to make a binding contract, a signature by him is sufficient, *and that applies to the case of third persons deputed to make a contract; as, in the well-known case of a broker, it may be shown by parol that the parties intended to make such a contract. It may be, that I should not have been dissatisfied if the jury had taken another view, and found that this document was an invoice; and I am not sure that, if I were on the jury, I should find a verdict for the plaintiff; but the question now is, whether there was any evidence for the jury, and that is the only matter on which we differ from the Court below. I think there was some evidence that Noakes was intended by the buyer and seller to make a record of a binding contract between them. The result is that the judgment of the Court below must be reversed, and the verdict will stand for the plaintiff. [*189]

I may add that my brother Willes, who heard a great part of the argument, entertains a strong view the same way. Indeed, I believe he is of opinion not only that there was evidence to go to the jury, but that the verdict ought to be for the plaintiff.

BYLES, J.—My brother Crompton has gone so fully into the case that I do not propose considering it at any length, but I cannot help stating how it presents itself to my mind.

I think there was evidence for the jury to sustain the verdict for the plaintiff. It appears by the cases that a signature, though not at the foot but at the head of the document, is abundantly sufficient.

Then, was Noakes an agent to bind both parties? It is true that he was the factor of the plaintiff, but the defendant knew that. The document was written by Noakes in the plaintiff's presence, so that without doubt he was bound. Then what does the defendant do? He sees a duplicate written by the hand of the agent, and he knows what was written: he suggests to the agent to make an alteration, and he *190] receives from him one *part so altered, knowing that there is a counterpart of the contract binding on the plaintiff; and the case finds that what was delivered to him was a note in duplicate. Then the only question is, whether Noakes was authorized to write the defendant's name in the way he did. There is no doubt he was, for the defendant, J. Evans, recognised and adopted it. The document not having been regularly signed at the first, it was a question for the jury whether the parties meant to be bound by it as it stood; and I say no more than that there was evidence for the jury that they did.

BLACKBURN, J.—I am also of opinion that there was evidence for the jury that the memorandum was signed, on behalf of the defendants, in such a way as to bind them. I do not read the case as if Noakes were a broker, who from the nature of his employment was authorized to register contracts between parties, and I do not understand from the case that the counterfoil was a bought note, so that if there had been a variance in the terms of that and the sold note, there would have been no contract between the parties: *Thornton v. Kempster*, 5 Taunt. 786 (E. C. L. R. vol. 1). I cannot think that the note handed to the defendants, and the copy which Noakes kept in his book, were ever intended to be bought and sold notes. But, taking the case as it stands, I think there was evidence from which a jury might infer that this was a memorandum signed by the defendants, so as to bind them.

The statute requires a note or memorandum signed by the parties to be charged, or their agents thereunto authorized. It is not necessary that the parties should sign, but it is essential that there should be a signature either by them or their agents thereunto authorized. Then the first question is, whether Noakes was authorized or requested by the defendants to write their name for the purpose of signing the *191] note. If *the matter were *res integra*, I should doubt whether a name printed or written at the head of a bill of parcels was such a signature as the statute contemplated; but it is now too late to discuss that question. If the name of the party to be charged is printed or written on a document, intended to be a memorandum of the contract, either by himself or his authorized agent, according to *Schneider v. Norris* and *Saunderson v. Jackson* it is his signature, whether it is at the beginning, or middle, or foot of the document. In *Johnson v. Dodgson* the memorandum was retained by the defendant in his own possession, but as it contained his name, and was intended to be a note of the contract, it was held binding on him, although the fact of his keeping it was a clear indication that he never intended it as a voucher of his being bound, but only to bind the other party. That is important to observe, because here the note handed to the buyers was never intended to be a voucher that the sellers were bound,

but to be kept by the buyers as a memorandum of a contract binding on them.

The judgments in this case in the Court below proceeded mainly on the observation of Wilde, B., in the course of the argument, that this document was merely an invoice or bill of parcels and not a contract binding on the defendants. So far I agree, that if an invoice or bill of parcels is made out and delivered by the vendor to the vendee, which is not intended to be a memorandum of the contract but merely the account of the vendor, that cannot be considered as a contract binding the vendee, for the vendor would have no authority to make it. But on the other point I differ. I cannot look upon this document as an invoice or bill of parcels in the sense that it was only intended to be the vendor's account of the contract. If the facts are looked at, it is impossible to deny that there is *evidence from which a jury [*192 might draw the inference that it was written by the defendants' authority as a record of a contract by which both parties meant to be bound—(His lordship read the statement in the case as to the drawing up and alteration of the memorandum.)—That is evidence for the jury that Noakes was requested to alter this writing, not merely as the seller's account, but as a record of the contract binding on *both parties. The document so altered was given to the defendants and kept by them. Therefore, the name of the defendants being written by an authorized agent on a document intended by them to be a memorandum of the contract, the case is identical with that of *Johnson v. Dodgson*, except that there the buyer wrote the terms of the contract and his name with his own hand; here Noakes wrote the buyers' name. That circumstance however affords no solid distinction except as to the weight of evidence; and I do not see why we should be called upon to overrule that case, which is productive of no evil. There is the decision of two eminent Judges that, where a document contains the name of the party to be charged, and he intended it to be a binding memorandum of the contract, that is sufficient. *Graham v. Musson* differs in this respect, that there the name of Musson, the buyer, did not appear on the document. At the request of Musson, Dyson, the seller's agent, signed it with his own name in order to bind the seller; and unless the name "Dyson" be read as "Musson," there was no signature by the buyer. But Dyson was the agent of North and Co., the sellers; and it is the same as if he had written "per proc. North and Co., J. Dyson." On that ground the case is consistent with *Johnson v. Dodgson*.

KEATING, J.—I am also of opinion that the judgment of *the Court below cannot be upheld, because there was evidence for [*193 the jury that the memorandum was written by the authority of the defendants. That being so, it is the same as if it was written by the defendants themselves; and if it had been written by them, there is abundant authority, from *Lemayne v. Stanley*, 3 Lev. 1, downwards, that a name appearing where this name does is sufficient to satisfy the requisites of the statute.

MELLOR, J.—I am also of opinion that the judgment of the Court below ought to be reversed. I confess, that when I first read the case I thought that there was not a sufficient memorandum of the contract, but I came to that conclusion without considering whether

there was evidence for the jury that, when the memorandum was signed by Noakes, the circumstances of the case clothed him with an authority to make a contract binding on both parties. Looking at the facts, I think there was evidence of such an authority. The circumstance of the plaintiff's appeal to Noakes shows that he was in the confidence of both parties; and at their request he drew up the memorandum, not as an invoice, but a binding record of what they had agreed upon. *Graham v. Musson* does not conflict with *Johnson v. Dodgson*; for in the former case there was no evidence of that on which we proceed in this decision. Judgment reversed.

*194] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CUMBERLAND v. COPELAND. May 20.

Held, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that an assignment of copyright made after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, need not be attested.

THIS was an appeal from the decision of the Court of Exchequer in discharging a rule to increase the damages, if the Court should be of opinion that an assignment of copyright in a dramatic piece, made after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, and attested by one witness only, was valid.

Lush (C. Pollock with him) argued for the plaintiff.—This assignment was made in the year 1835, after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, which repealed the former Acts. The 8 Anne, c. 19, required that an assignment of copyright should be in writing, but neither that Act nor the 54 Geo. 3, c. 156, in terms required that the assignment should be attested by two witnesses. The 8 Anne, c. 19, s. 1, conferred on the author of any book a copyright for fourteen years, and imposed a penalty on any person who should within that time print and publish it "without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses." The 41 Geo. 3, c. 107, which extended the copyright to another term of fourteen years, if the author were then living, contained a similar prohibition against printing and publishing any book without the consent of the proprietor. Both the 8 Anne, c. 19, and 41 Geo. 3, c. 107, *195] required a consent to be in writing and attested by two witnesses; but the 54 Geo. 3, c. 156, though it requires the consent to be in writing, omits the words "signed in the presence of two or more credible witnesses." In *Power v. Walker*, 3 M. & Sel. 7, the assignment was not in writing, and Lord Ellenborough said, "that the statute (8 Anne, c. 19) having required that the consent of the proprietor, in order to authorize the printing or reprinting of any book by any other person, shall be in writing, the conclusion from it

seemed almost irresistible that the assignment must also be in writing; for if the license, which is the lesser thing, must be in writing, a fortiori the assignment, which is the greater thing, must be also." That case was decided on the 13th June, 1814, and on the 29th July, in the same year, the 54 Geo. 3, c. 156, passed, so that it would seem that the legislature studiously omitted the requisition, contained in the two former Acts, of an attestation by two witnesses. The 54 Geo. 3, c. 156, has by implication repealed the 8 Anne, c. 19. The 4th section of the 54 Geo. 3, c. 156, recites the two former Acts, and extends the copyright to twenty-eight years and for the life of the author. It then repeats, in the same language as in the former Act, the prohibition against printing and publishing any book without the consent of the proprietor in writing, but omits all mention of attestation. That is inconsistent with the statute of Anne, and therefore impliedly repeals it. An author, having acquired a new right under the 54 Geo. 3, c. 156, cannot render an assignee liable to the penalty because his written assignment is not attested. The 2d section of the 8 Anne, c. 19, is also inconsistent with the 5th section of the 54 Geo. 3, c. 156; for by the former Act a person is not subject to any penalty for printing a book without the consent of the proprietor, unless it is entered in the register-book of the Company of Stationers; while by the latter Act the only *effect of the [*196 omission to register is to subject the publisher of the book to a penalty of 5*l*. There is no authority against this view. *Davidson v. Bohn*, 6 C. B. 456 (E. C. L. R. vol. 60), was decided after the 54 Geo. 3, c. 156, but in that case the date of the assignment does not appear, and this point was not raised. In *Jefferys v. Boosey*, 4 H. L. 815, the point incidentally arose, and a majority of the Judges were of opinion that the 8 Anne, c. 18, impliedly repealed the 54 Geo. 3, c. 156. [CROMPTON, J.—Lord St. Leonards is really the only authority against the plaintiff, as *Alderson, B.*, attached too much weight to *Davidson v. Bohn*.] In *Kyle v. Jeffreys*, 3 Macq. 611, 617, Lord Wensleydale said:—"I think that the opinion of the six Judges in the case of *Jefferys v. Boosey* was correct; that, since the statute of 54 Geo. 3, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses, and I think that in this case the receipt in writing of the 14th May, 1841, would operate as an effectual assignment."

Murray, for the defendant.—The doctrine laid down in *Power v. Walker*, 3 M. & Sel. 7, has never been questioned in a Court of error; and for more than forty years has been considered as settled law. It was expressly recognised by Lord Eldon in *Morris v. Kelly*, 1 Jac. & W. 481. The same doctrine prevails in the case of patent right. Every patent contains a clause prohibiting any person from using the invention without the consent in writing of the patentee under his hand and seal; and therefore an assignment must be made in the same manner. [BLACKBURN, J.—It may be doubtful whether the Crown has power to alter the common law right of assignment. CROMPTON, J.—Assuming that an assignment is only *a per- [*197 petual license, when the legislature, by the 54 Geo. 3, c. 156, s. 4, provides for the case of a license, it also provides for the case of an assignment, and if the reasoning of Lord Ellenborough be carried

out, as that Act does not require that a license should be attested, so neither is it necessary that an assignment should be attested.] The 8 Anne, c. 16, s. 1, should be read as if it contained an express enactment that an assignment shall be in writing attested by two witnesses; and that is not repealed by the 54 Geo. 3, c. 156. In *Jefferys v. Boosey*, 4 H. L. 815, even the Judges who dissented on the main point agreed that the construction put upon the statute of Anne in *Power v. Walker* ought not to be disturbed. The 8th section of the 54 Geo. 3, c. 156, conferred on authors new rights. It provided that if the author of any book not published fourteen years at the time that Act passed, should afterwards die before the expiration of the fourteen years, his personal representative should have the sole right of printing and publishing the book for the further term of fourteen years after the expiration of the first fourteen years. Now, the right to the original term of fourteen years was under the 8 Anne, c. 19, but if that statute was repealed by the 54 Geo. 3, c. 156, the term would cease, and the provisions of the 8th section of the latter Act would fail of effect. The 54 Geo. 3, c. 156, was never intended to interfere with the decision in *Power v. Walker*. That bill was introduced into the House of Commons on the 10th May, 1814, and *Power v. Walker* was decided on the 13th June, 1814. The 8 Anne, c. 19, contained, in effect, two distinct provisions, viz., that a consent shall be in writing attested by two witnesses, and that an assignment shall be in writing attested by two witnesses; and though the 54 Geo. 3, c. 156, has dispensed with *198] the necessity for two witnesses in the case of a consent, it does not follow that it has altered the law with respect to an assignment. As observed by Lord St. Leonards in *Jefferys v. Boosey*, 4 H. L. 995, "it would rather seem, after such a tenor of determination, after the law had been so settled, that the legislature, by being silent with regard to the assignment, meant that to remain although it altered the law with respect to the consent." The 54 Geo. 3, c. 156, does not in express terms repeal the 8 Anne, c. 19, and there is no reason why it should be considered as doing so by intendment; for the two Acts may well stand together.

Lush was not called upon to reply.

ERLE, C. J.—I am of opinion that the judgment of the Court below ought to be reversed.

The question is, whether an assignment of copyright, after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, attested by one witness only, is valid. The contention is that no such assignment can be valid unless it is attested by two witnesses. The reasoning upon which that is founded is that the 8 Anne, c. 19, which was passed to protect authors, contains stringent provisions against the infringement of copyright, and provides that the consent of an author to the publication of his book shall not be proved except by a writing attested by two witnesses; and therefore the law was clearly established, that the proprietor of a book could not give his consent to its publication by another person except by a writing attested by two witnesses. The question having arisen in 1814, in *Power v. Walker*, 3 M. & Sel. 7, whether a copyright could be assigned *without writing*, the Court of King's Bench held that an assignment was in the nature of a perpetual license, and if a license, which is a less thing, must be in

writing, a fortiori an assignment must also be in *writing. [*199 Whether or no an assignment must be attested by two witnesses was not the question before the Court. In *Davidson v. Bohn*, 6 C. B. 456, the question was considered as if the assignment had been made before the 54 Geo. 3, c. 156, and the same reasoning was adopted, viz., that an assignment must be in writing because a license must be in writing; an assignment must be attested by two witnesses because a license must be attested by two witnesses. However, the 54 Geo. 3, c. 156, passed, which enacted that after that statute the consent must be *in writing*; so that a consent in writing would be a defence to a suit for the infringement of copyright. An enactment that a consent in writing shall be valid is, by implication, an enactment that a consent in writing shall be valid without being attested by two witnesses. It is clear to my mind that, after the 54 Geo. 3, c. 156, passed, the plaintiff could not, without infringing the express words of the statute, say that a consent in writing did not bind him unless attested by two witnesses; and if a consent in writing is valid without being attested by two witnesses, it seems to me, as a matter of reasoning, to follow that an assignment is valid without being attested by two witnesses; for if, as was argued, prior to the 54 Geo. 3, c. 156, because a consent in writing was not valid unless attested by two witnesses, so neither was an assignment, as a consent in writing is now valid without being attested by two witnesses so also is an assignment.

The case of *Davidson v. Bohn* seems to me beside the question, which is, what is the effect of the 54 Geo. 3, c. 156; and in *Jefferys v. Boosey* there were six Judges, including Chief Justice Jervis and my brother Crompton on one side, and Baron Alderson and Lord St. Leonards on the other side. Baron Alderson, however, was by implication in favour of the view we now take, because *he considered that *Davidson v. Bohn* was decisive of the question, with- [*200 out adverting to the fact that it did not proceed upon the construction of the 54 Geo. 3, c. 156. In truth, that case does not touch this point, since the 54 Geo. 3, c. 156, destroyed the force of the reasoning on which the judgment of Lord Ellenborough in *Power v. Walker* was founded.

In *Jefferys v. Boosey*, Lord Wensleydale said that, after much consideration, he thought that the 54 Geo. 3, c. 156, had impliedly repealed the 8 Anne, c. 19; and having had time to mature his judgment, in the interval between *Jefferys v. Boosey* and *Kyle v. Jefferys*, 3 Macq. 61, in the latter case he states his present opinion, that since the 54 Geo. 3, c. 156, an assignment in writing of a copyright need not be attested by two witnesses. Lord St. Leonards in *Jefferys v. Boosey* expressed a contrary opinion. He seems to have considered that by the construction put upon the 8 Anne, c. 19, a consent and an assignment have been impliedly declared to be void unless in writing attested by two witnesses, and that though the 54 Geo. 3, c. 156, repealed the provision as to the consent, it did not repeal it as to the assignment. That is an extended construction of a statute which, according to our opinion, is repealed; and with great deference to Lord St. Leonards, I cannot help thinking that the statutes afford strong ground for that opinion.

It seems to me that where there is a conflict of opinion the result

of the legislation is worthy of the attention of the Court; and if we put the construction contended for on these Acts we should enable the vendor to keep the price and defeat the sale, because he has not complied with a technical formality. The assignment must be in writing, but it seems to me that the legislature has purposely omitted, in the 54 Geo. 3, c. 156, that it shall be attested by two witnesses. *201] In the case of wills it may well *be that greater form and ceremony is required in order to avoid all doubt as to the intention of deceased persons, but that cannot apply to ordinary contracts between living persons. For these reasons I am of opinion that the judgment of the Court below must be reversed.

CROMPTON, J.—I am of the same opinion. I will not repeat the reasons which have been so fully stated by the Lord Chief Justice, and in which I entirely concur; but will only make an observation on one of the ways in which the case was put by Mr. Murray, viz., that the 8 Anne, c. 19, s. 1, must be read as if it contained two distinct clauses, the one relating to a consent, the other to an assignment. But that is not the meaning of the statute. Supposing the legislature, when they treated of a consent or license, in effect included an assignment as a kind of perpetual license, which is the groundwork of Lord St. Leonards's reasoning, I cannot think his reasoning satisfactory. He says that, although the legislature has dispensed with the necessity of two witnesses to a consent, it does not follow that two witnesses are no longer necessary to an assignment. Lord Ellenborough merely said that a license included an assignment (not as if there were two separate clauses, the one relating to a consent, the other to an assignment); therefore, when the clause as to the consent was repealed, it would follow that, as that clause governed the assignment, the necessity for two witnesses in that case also no longer existed.

WILLES, J., BLACKBURN, J., KEATING, J., and MELLOR, J., concurred.

Judgment reversed, and rule absolute to increase the damages.

*202] *IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

WAKE, Executor of T. WILKINSON, v. T. W. HARROP and J. C. HARROP. May 17.

To a declaration on a charter-party, alleging as a breach a refusal by the defendants to load a cargo, the defendants pleaded as an equitable defence that they entered into the charter-party solely as agents for A. D. and Co., and that when the defendants signed the charter-party it was agreed and understood between the plaintiff and the defendants that the defendants were only to sign the charter as such agents, so as to bind A. D. and Co., and were not to make themselves liable as principals for the performance of the charter: that they signed as follows:—“For A. D. and Co., of Messina, H. and Co., agents,”—the defendants and the plaintiff bona fide believing at the time the charter was made, that the defendants having so signed would not be liable to be sued on the charter, notwithstanding the charter in the body thereof professed to be made between the plaintiff as owner of the one part and the defendants as freighters on

the other: that the defendants had power to bind A. D. and Co., and that the plaintiff was inequitably taking advantage of the mistake in drawing the charter:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea showed a good equitable answer to the action.

And per Willes, J.—Semble, that the plea was a good answer at law.

THIS was a proceeding in error on the judgment of the Court of Exchequer for the defendants on demurrer to a plea on equitable grounds. The pleadings fully appear in the report of the case in the Court below. (6 H. & N. 768.†)

Manisty (with whom was *Lewers*) argued for the plaintiff.(a)—First, it is not competent to the defendants to give parol evidence to discharge themselves from an obligation which they have contracted by a written instrument. This does not differ from the ordinary case of an agent who signs as principal and then seeks to exonerate himself by evidence that he was an agent. But parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of *entering into it: *Smith's Leading Cases*, vol. 2, p. 331, 5th ed.; *Thompson v. Davenport*, 9 B. & C. 78 (E. C. [*203 L. R. vol. 17]).—Secondly, the question as to the defendant's liability is one of construction, and parol evidence is not admissible for the purpose of putting a construction on the agreement. The intention of the parties must be collected from the instrument itself, which is the sole evidence of the contract, and it is immaterial what took place at the time the agreement was signed: *Fawkes v. Lamb*, 31 L. J., Q. B. 98. The result of the authorities is thus stated in *Smith's Leading Cases*, vol. 2, p. 326, 5th ed.:—"In all these cases the question whether the person actually signing the contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule, that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." In *Hollier v. Eyre*, 9 Cl. & F. 1, 45, Lord Cottenham laid down that "the question whether the plaintiff, as between himself and the grantees, was a principal in the grant of the annuity, or only a surety for payment of it by another, must be ascertained by the terms of the instruments themselves, and that no extraneous evidence is admissible for that purpose." It is not denied that an equity may arise, dehors the instrument, from the relation of principal and surety *inter se*, if known to the creditor. Upon that principle *Greenough v. McClelland*, 30 L. J., Q. B. 15, proceeded. [CROMPTON, J.—In *Davies v. Stainbank*, 6 De Gex, M. & G. 679, Lord Justice Turner states that a Court of equity considers it a fraud in *a creditor [*204 to proceed at law against a surety after he has agreed with principal debtor to enlarge the time for payment of the debt.] In *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90), the plaintiff received the promissory note upon an express agreement that the

(a) Before Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.

defendant should be liable as surety only, and the plaintiff, without the knowledge or consent of the defendant, gave time to the principal debtor; so that an equity arose, dehors the instrument, from the relation of principal and surety and the knowledge by the creditor of the existence of that relation. But in this case there is nothing to create such an equity, for the defendants are described in the charter-party as the contracting parties.—Thirdly, it will be contended that the plea discloses a mistake in drawing up the charter-party for which a Court of equity would afford relief. But it is too late to reform the contract, for the defendants have acted under it and committed a breach of it. [WILLES, J.—I do not see the distinction in principle between a mistake as to the legal effect of the words used, and a mistake in the words themselves. If a stranger, in drawing up a contract, either inserted or omitted terms, contrary to the intention of the parties, or used words capable of a meaning different from that which the parties intended, equity would relieve. So if an attorney innocently misled the parties as to the legal effect of a document, and they were induced to sign it under a misapprehension of its meaning, would not a Court of equity give relief?] In *Lewis v. Jones*, 4 B. & C. 506, 512 (E. C. L. R. vol. 10), (a) Bayley, J., said that every man is supposed to know the legal effect of an instrument which he signs, and therefore a misrepresentation as to its meaning will not avoid it. This is a mistake, *205] not in matter of fact, but in law, and a Court of equity will not set aside a contract, because there is a mistake in law, where there is no fraud: *Marshall v. Collett*, 1 Y. & Col. Exch. 232, 238.†. *The Midland Great Western Railway of Ireland v. Johnson*, 6 H. L. 798, affirmed these two propositions, that a mistake in matter of law affords no ground for relief in equity; and that a mistake as to the construction of a contract is a mistake in matter of law. *Pym v. Campbell*, 6 E. & B. 370 (E. C. L. R. vol. 88), only decided that parol evidence was admissible to show that a memorandum of the terms of a sale, signed by the parties, was not to be an agreement unless approved of by a third person. There it was not sought to alter the writing itself, but merely to show that it was not an agreement. [BYLES, J., referred to *Wallis v. Littell*, 11 C. B. N. S. 369 (E. C. L. R. vol. 103).] If the defendants are not liable on this charter-party, there is no contract. The plaintiffs could not sue Davidson and Co., for where an agent enters into a written contract disclosing the name of his principal, and notwithstanding he signs as agent, by the terms of the instrument makes himself personally responsible as the contracting party, the principal is not liable. [WILLES, J.—In *Humble v. Hunter*, 12 Q. B. 310 (E. C. L. R. vol. 64), where a charter-party was executed, not by the plaintiff, but by a third person who in the contract described himself as “owner” of the ship, it was held that evidence was not admissible to show that such person contracted merely as the plaintiff’s agent.] In that case the terms of the charter-party do not appear; here the defendants have personally contracted that the ship shall be loaded. [CROMPTON, J.—Whether Davidson and Co. are liable or not, how can that

(a) Willes, J., stated that he had the best authority for saying that the note at the end of that case, which has been attributed to Holroyd, J. (see *Kearsley v. Cole*, 16 M. & W. 136†), was written by Sir C. Cresswell.

affect the defendants' right to be relieved from a contract by which neither party intended they should be bound?] If the plea merely discloses equitable ground for reforming the contract, a Court of law cannot give relief: *Perez v. *Oleaga*, 11 Exch. 506;† *Wodehouse v. Farebrother*, 5 E. & B. 277 (E. C. L. R. vol. 85); *Teede v. Johnson*, 11 Exch. 840.† The doctrine laid down in Story's Equity Jurisprudence, ss. 115, 152, 155, has reference to mistake of fact, that is, mistake in the instrument itself. [WILLES, J., referred to *Vorley v. Barrett*, 1 C. B., N. S. 225 (E. C. L. R. vol. 87).] That was the case of a mistake of fact. A person could not be heard in a Court of equity to say:—"True I have become a party to an instrument by which I personally contracted, but I did not intend to make myself responsible."

Mellish (with whom was *Leofric Temple*) appeared for the defendants, but was not called upon to argue.

CROMPTON, J.—I am of opinion that the judgment of the Court below ought to be affirmed. It seems to me that the plea raises a good equitable defence. The reasons for so holding are sufficiently expressed in the opinions of the learned Barons in the Court below, and I think the plea good on the grounds stated by them. This is not a case in which a contracting party says that he had no intention to be personally bound, but a case in which there was an express agreement between the parties that the defendants should not be liable as principal, and that when they signed the agreement both parties thought that they were making the real principal and not the defendants liable. Therefore the plea discloses an equity similar to that in *Davies v. Stainback*, 6 De Gex, M. & G. 679, for it is in equity a fraud to sue the defendants when it was agreed that they should not be personally bound. Moreover this is not the case of a party seeking to put a different construction upon an agreement than that which its language imports, and saying "that is not the *agreement I entered into;" but merely "I agree to sign in this way [207 as the best way of making my principal liable, and upon the express understanding that I was not to be personally responsible." Under these circumstances it is inequitable to sue him. My brother Willes, in the course of the argument, put the case of an attorney who, without fraud, misrepresented the effect of an agreement whereby the parties were induced to sign it; or suppose that, before this agreement was signed, there had been a written correspondence to the effect set out in the plea, and upon the faith of it the defendants had signed the agreement, the instrument itself would not prevail, but there would be relief in equity. It is said that there is no case in which equity has interfered when the parties have misunderstood and acted upon a misapprehension of their rights under an agreement, and it would be strange if there was; but on the other hand no case goes the length of saying that the doctrine laid down by Mr. Justice Story in his work on Equitable Jurisprudence(a) is not correct, and that equity will not interfere where, by mutual mistake, a document has been signed which operates in law directly contrary to the express agreement and intention of both parties.

It is argued that the defendants are not entitled to relief by equita-

(a) Cap. 5, tit. *Mistake*, ss. 115, 152, 155.

ble plea, because Davidson and Co., their principals, are not liable under the agreement, and therefore the only relief which the plaintiff can obtain is by applying to a Court of equity to reform the agreement. But I think that the right answer to that argument has been given by the Court below; we are not bound to find out who is liable, it is enough that the intention was that the defendants should not be personally liable. I do not give any opinion upon the point whether the principal can be sued where the agent has made *208] himself personally liable. It may be that some *nice questions may arise on that point; but here the plea avers that the defendants by signing the charter did make Davidson and Co. liable. But, even if they were not liable, that is no reason for suing the defendants in violation of the express agreement between the parties that they should not be personally responsible.

Then it was said that a Court of equity would not grant an unqualified restraint against suing the defendants. I do not agree with that, as it would be inequitable that the plaintiff should sue the persons who it was never intended should be liable. Neither do I think that the defendants' remedy is by reforming the contract, for the very ground of defence is that there was no contract between the parties. If, indeed, the plaintiff could call on the defendants to make a fresh contract there might be some difficulty. But that is answered in two ways; first, there is no reason to suppose that Davidson & Co. are not liable, and on these pleadings they must be taken to be; secondly, the defendants could not now make an agreement to bind their principals, because their office as agent has been performed. Therefore the argument for the plaintiff not only fails in point of law but of fact, because, if Davidson and Co. are not liable under the agreement, they cannot now be made liable, and if they are liable, the plaintiff cannot break his agreement and sue the defendants.

WILLES, J.—I wish to add that I offer no opinion conflicting with that entertained by my brother Bramwell in the Court below, as to this alleged fraud being a fraud with which a Court of law is capable of dealing without the exercise of the power conferred by the 83d section of the Common Law Procedure Act, 1854. Where there is a written contract, and one party attempts to take advantage of a mistake in it, I am disposed to think that might be dealt with by a Court *209] of *law. For instance, suppose a vessel was loaded with a box of glass beads marked 99, and also with a box of diamonds marked 100, belonging to the same person, and he sold the beads, but by mistake they were described in the written contract as the contents of the box marked 100, so that it would seem that the diamonds were sold. When the vessel arrived and the mistake was discovered, could any lawyer say that the purchaser of the beads could enforce the contract against the seller for the diamonds, because they were described on paper as the subject-matter of the sale? That would be a case of error on both sides, and it would be a fraud to attempt to enforce the contract in a sense in which neither party understood it or intended. Therefore, as at present advised, I do not dissent from the opinion of my brother Bramwell, that a Court of common law is capable of dealing with a fraud of this description. I agree, how-

ever, with my brother Crompton, that at all events the plea affords a good equitable defence.

BYLES, J.—I should not have added a word if my brother Willes had not intimated an opinion that this plea was a good defence at law. I feel bound to say that I think the plea affords no defence at law. Parol evidence may be given to charge an unauthorized agent as principal, but parol evidence cannot be admitted to discharge an agent who signs an instrument so as to make himself personally liable. Therefore the defendants must rely upon their equitable plea, as showing what was the intention of the parties at the time the agreement was entered into. Here there has been a mutual mistake, in one sense a mistake in law, but in another it is not, for there is no misconception of legal rights; but the mistake is in the effect of the instrument, by including in it, as a contracting party, a person who was never intended to be included. For the reasons already [*210] given I think that is ground for relief by equitable plea. It is in the nature of fraud on the part of the plaintiff; and it would be monstrous to suppose that the defendants could not obtain relief.

KEATING, J.—I am of opinion that the judgment of the Court below ought to be affirmed, on the ground that the plea discloses a good equitable defence.

MELLOR, J.—I concur in opinion with my brother Crompton, and will only add that I am inclined to think that this is not a good plea at law; though I should have some hesitation in expressing a formal judgment to that effect after the opinion of my brothers Willes and Bramwell.

Judgment affirmed.

MEMORANDUM.

In this Vacation Michael O'Brien, of Lincoln's Inn, Esquire, and Frederic Lowten Spinks, of the Inner Temple, Esquire, were respectively called to the degree of the coif, and gave rings, with the motto "*Aliud nobis est agendum.*"

Erchequer Reports.

TRINITY TERM, 25 VICT. 1862.

BOTTOMLEY *v.* FISHER. *May 27.*

The defendant, the secretary of a benefit building society, signed a promissory note in the following form:—"Midland Counties Building Society, No. 3. Birmingham, 1st Sept. 1856. One month after demand, we jointly and severally promise to pay J. B. the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per cent. per annum (payable half-yearly), for value received, W. H., S. B., Directors. W. F. Secretary:—Held, that the defendant was personally liable on the note.

DECLARATION on a promissory note, dated the 1st of September, 1856, and made by the defendant for payment of 120*l.*, with interest at 6*l.* per cent., one month after demand.

Plea.—That the defendant did not made the note.

At the trial, before Cockburn, C. J., at the last Warwick Spring Assizes, it appeared that the promissory note was in the following form:—

"Midland Counties Building Society, No. 3.

"Birmingham, 1st Sept., 1856.

"One month after demand, we jointly and severally promise to pay Mr. John Bottomley the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per cent. per annum (payable half-yearly), for value received.

"W. R. HEATH, }
"S. B. SMITH, } Directors.

"W. D. FISHER, Secretary."

It was proved that, at the time the note was made, W. R. Heath and S. B. Smith were directors of a benefit building Society, called "The Midland Counties Building Society, No. 3," of which the defendant was secretary. The plaintiff had been a member of another Society, called "The Midland Counties Building Society, No. 1," and on the dissolution of that Society was entitled to receive 120*l.* *212] *as the value of his share. The plaintiff agreed that this sum should be passed from the credit of Society No. 1 to that of Society No. 3, and he received as a security the promissory note on which this action was brought. The Society No. 3 was duly enrolled under the 10 Geo. 4, c. 56, and the 6 & 7 Wm. 4, c. 32. The following was amongst the rules of the Society:—

"Rule 5. The trustees shall pay all sums of money ordered by the

committee to be paid on behalf of this Society by checks on the appointed bankers, and these checks shall be signed by two of the trustees, and countersigned by the secretary.

"All deeds, writings, and securities to and from this Society shall be made and taken in the names of the trustees for the time being, and all the property, whether real or personal, belonging to this Society shall be vested in them."

"The trustees shall (with the consent of the committee) be empowered to borrow or take up at interest any money from the bankers of this Society, or from any member or other person, to secure which the trustees may give their own personal or other security, and they shall be indemnified by the members," &c.

It was submitted, on behalf of the defendant, that he was not liable on the note, inasmuch as he had only signed it in his capacity of secretary. The learned Judge directed a verdict for the plaintiff for the amount of the note and interest, reserving leave to the defendant to move to enter the verdict for him.

Field, in last Easter Term, obtained a rule nisi accordingly, on the ground that the defendant was not the maker of the note.

Wills now showed cause.—It is said that the defendant *is [*218 not personally liable on the note because he has signed it only in his capacity of secretary. But the fact of the word "secretary" being placed after his name does not exempt him from liability. In *Thomas v. Bishop*, 2 Stra. 955, a bill of exchange was addressed to the defendant as "cashier" of a Company; and, he having accepted it generally, it was held that he was personally liable, though the order was to place it to the account of the Company. In *Leadbitter v. Farrow*, 5 M. & Sel. 345, an agent to a country bank to whom the plaintiff sent a sum of money, in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same; and it was held that the agent was liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank to which the agent paid over the money. Lord Ellenborough there said:—"Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable." [CHANNELL, B., referred to *Lindus v. Melrose*, 3 H. & N. 177.†] There the note was in the following form:—"Three months after date we jointly promise to pay Mr. F. Shaw or order six hundred pounds for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited." The Court of Exchequer Chamber considered that if the words "for value received in stock" were read as if in a parenthesis, there would then be a promise to pay expressly on account of the Company. The Court also adverted to the absence of the word "severally;" and said, "if, as in one or *two of the cases cited on the argument, the expression [*214 had been 'jointly and severally,' it would have been difficult to resist the conclusion that the promise was a personal one, for in what other character would the directors promise severally?" Here

the word "secretary" is mere matter of description. By the 10 Geo. 4, c. 56, which was extended to benefit building Societies by the 6 & 7 Wm. 4, c. 32, s. 4, those Societies are empowered to make rules which, when entered in a book kept by an officer of the Society and confirmed by the justices at quarter sessions, become binding on the members, officers, and contributors of the Society: sect. 8. Then, supposing there was anything in the rules to exempt the defendant from liability, the plaintiff is not a member of the Society, and therefore the rules are not binding on him. But the 5th rule empowers the trustees to borrow money and give their personal security; and it provides that they shall be indemnified by the members. It was no part of the secretary's duty to sign this promissory note, and there is nothing on the face of it to show that it was made on behalf of the Society. In *Price v. Taylor*, 5 H. & N. 540,† the promissory note, which was signed by the trustees and secretary of this Society, was in the same form as this note, except that the words "jointly and severally" were there omitted; and it was held that the parties who signed the note were personally liable upon it, and that the right of the holder to sue them was not affected by the 6 & 7 Wm. 4, c. 32, and 10 Geo. 4, c. 56, s. 21. There *Martin, B.*, referred to *Bayley on Bills*, ch. 2, s. 8, where it is said:—"Where a bill or note is drawn by an agent, executor, or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to show that intention." In *Healey v. Story*, 3 Exch. 3,† it was held that the words "jointly and severally" were equivalent to *215] "jointly and personally;" and that the defendants, who signed as directors of a joint stock Company, were personally liable to the plaintiff. That decision was recognised and adopted in *Maclae v. Sunderland*, 3 E. & B. 1 (E. C. L. R. vol. 77).

Field, in support of the rule.—The defendant is not liable on this promissory note. The money was lent by the plaintiff to the Society No. 3, upon the security of the note, signed by two directors of the Company and countersigned by the secretary, under the 5th rule, which empowers the trustees to borrow money at interest and give their personal security, and provides that they shall be indemnified by the members. In *Thomas v. Bishop*, 2 Str. 955, there was nothing to indicate that the defendant accepted the bill in his capacity of cashier, or that he did not intend to be personally bound; and it was only from the direction on the bill that any limitation of his liability could be inferred. There the instrument could have had no effect unless the defendant was personally bound; here the instrument operates against the trustees, under the 5th rule. Again, in *Leadbitter v. Farrow*, 5 M. & Sel. 345, the acceptance was general, and without any words excluding a personal liability. Here the defendant has written the word "Secretary" after his name, thereby indicating that he merely countersigned as an officer of the Society. In *Butt v. Morrell*, 12 A. & E. 745 (E. C. L. R. vol. 40), the bill was drawn on the directors of a joint stock Company, and accepted by three of them, and above their acceptance one of the defendants, who was a shareholder, signed his name, "Richard Parker, manager." The jury found that Richard Parker, as a manager, was not an acceptor; and it was held that he was not liable, either by his having actually

signed his name *with those of the directors, or by their having accepted the bill as directors of a Company in which he held shares. *Lindus v. Melrose*, 3 H. & N. 177,† is an authority in favour of the defendant. There the promissory note was signed by three directors of a joint stock Company, and was countersigned by the secretary of the Company, and it was held that the directors were not personally liable. In *Price v. Taylor*, 5 H. & N. 540,† it did not appear that by a rule of the Company the trustees were empowered to borrow money, and therefore there was nothing to exclude the personal liability of the party who signed as secretary. *Healy v. Story*, 3 Exch. 3,† does not govern this case, because here the words "jointly and severally" are applicable to the directors.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. Any person reading this promissory note would come to the conclusion that there is nothing on the face of it to exempt from personal liability any of the parties who have signed it. The signature of the secretary is not different in form from that of the directors; and all the persons whose names appear upon the note have signed it in their individual capacity. The case of *Bult v. Morrell*, 12 A. & E. 745 (E. C. L. R. vol. 40), turned mainly on the fact that the jury found that the manager did not sign the bill as acceptor, but merely put his name on it as an officer of the Company. This rule was granted rather from the circumstance of the point having been reserved than from any doubt we entertained about it.

BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. The only evidence, other than the note, *was, first, that the plaintiff lent his money to the Society, and, secondly, that the Society was governed by certain rules, which are obviously only binding on the members inter se. Though the directors may have given the note as a security for money lent to the Society, in considering whether they are individually liable, we must decide upon what appears on the face of the instrument. Now, we have the authority of *Price v. Taylor* that a note signed in this way binds the directors. Then the case is reduced to this, is not the defendant equally bound? It is true that he is secretary; but they are directors, and that does not prevent them from being personally liable. Suppose the words "directors" and "secretary" had been left out of the note, could there have been any difficulty? None whatever. But it is said that the addition of the word "secretary" exempts the defendant from liability. I cannot think that the circumstance of the defendant adding "secretary" to his name makes any difference.

This case is distinguishable from *Bult v. Morrell*. There the bill was addressed to the directors of the Company, and therefore the drawees were the directors. The three directors who accepted it treated it as a bill addressed to the Company, and they state that they accepted it for the Company, so that they accepted per procuration. The defendant Parker, not being a director, was not a drawee, and therefore he did not make himself liable as acceptor by putting his name on the bill. In *Lindus v. Melrose*, 3 H. & N. 177,† the point decided was not whether some of the parties who signed the note being personally liable, others were also liable, but whether any of them were liable. *Price v. Taylor* is a distinct authority that the two

directors who signed this note are personally liable; then is there any *218] reason why the *defendant should not also be liable? It is possible that he did not mean to make himself personally responsible; on the other hand, it is probable that he had no objection to sign his name as an additional security to the plaintiff; but however that may be, he has made himself personally liable by the mode in which he has signed the note.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. Looking at the evidence apart from the note itself, I am of opinion that the defendant is liable. The plaintiff is a stranger to the Society, and it may well be that he was content to lend his money upon getting the security of the secretary as well as the directors. Then, looking at the note itself, is there anything with reference to the signature, or the part of the note in which it is found, to exclude a personal liability? I think not. The defendant has signed the note in such a way as to make himself jointly and severally liable with the two other persons who signed it. This case is distinguishable from *Bult v. Morrell*, 12 A. & E. 745 (E. C. L. R. vol. 40), for there the question was whether Parker, the manager of the Company, was jointly liable with the directors as an acceptor of the bill, and the jury found that he did not sign his name as acceptor, but only as an officer of the Company. Rule discharged.

*219] *SCOTT v. LORD SEYMOUR. *May 28,*

A British subject may maintain, in the Courts of this country, an action against another British subject for an assault committed in a foreign country, notwithstanding proceedings have been taken at his instance, and are pending, in a Court of that country in respect of the same assault and battery.

To an action for assault and false imprisonment the defendant pleaded:—First: (except as to the imprisonment), that the trespasses were committed at Naples, and that the plaintiff and defendant resided there and were amenable to the laws there in force; that proceedings were taken, at the instance of the plaintiff, before the Judge of a certain Court at Naples, according to the articles of the penal procedure laws of that country: and that according to the law of that country the defendant was not liable to be sued by the plaintiff in any civil action, or other proceedings, to recover damages for the alleged trespasses, nor liable to any other proceedings in respect of the trespasses except those taken and instituted under the laws aforesaid and which were still pending and undetermined in the said Court at Naples.—Secondly: (except as to the imprisonment), that according to the law of Naples the defendant was not liable to be sued by the plaintiff, and he could not recover any damages in a civil action, or other proceeding, for the alleged trespasses until the defendant had been condemned and found guilty of those trespasses, or some part thereof, in the said penal proceedings which were still pending and undetermined.—Thirdly; (as to the imprisonment), that according to the law of Naples the defendant was liable to certain penal proceedings for the said imprisonment, if not authorized by the law of the country; and that, according to the law of the country, no civil action, or other proceedings, could be maintained to recover damages for the imprisonment, if illegal, until after the defendant had been condemned and found guilty of the illegal imprisonment in such penal proceeding; and that the defendant had not been condemned in such penal proceedings, nor had the plaintiff taken any such penal proceedings against the defendant, or endeavoured to procure him to be condemned or found guilty of the said imprisonment.—Held, that the meaning of the first plea was that proceedings had been taken and were pending, at the instance of the plaintiff, in the Neapolitan Court, and that except those proceedings none could there be taken; and if so, the plea did not negative that those were proceedings in which a compensation or damages might be recovered, and therefore the plea was bad.

Held, that the second and third pleas were also bad, for they disclosed mere matter of pro-

cedure, to be governed by the *lex fori*; since they assumed that the acts complained of were the subject of civil proceedings in Naples to recover damages; but that as a preliminary there must be a penal proceeding and conviction.

Held also, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the first plea did not contain any averment that damages might not be recovered by the law of Naples for the alleged trespasses, and without such an averment it must be taken as against the defendant that they might; and if so, the question was one of procedure merely, and governed by the *lex fori*; and there was nothing to oust the jurisdiction of the English Courts to entertain an action to recover damages.

Held, also, that a British subject may maintain an action in this country against another British subject to recover damages for an assault and battery committed in a foreign country; although by the law of that country no damages are recoverable for such trespasses:—Per Wightman, J.

Held also, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the second and third pleas were bad, since they merely disclosed an objection to procedure which must be determined by the *lex fori*, not the *lex loci*; that in effect the second plea amounted to no more than *auter action pendant* in a foreign country.

DECLARATION.—That the defendant assaulted and beat the plaintiff, and with a certain instrument struck him *on the head and on other parts of his body, and then dragged and pulled him [220 about and ill-treated him, and threw him on the ground and imprisoned him and caused him to be imprisoned, whereby the plaintiff sustained concussion of the brain and fracture of the hip and other grievous injuries, &c.

Pleas, (inter alia).—First (except as to the imprisonment of the plaintiff).—That the said alleged trespasses were and every part thereof was, committed out of the jurisdiction and dominion of the Queen of England, and out of the jurisdiction of this Court, to wit, at Naples, and not elsewhere. And that, at the time of the committing of the said trespasses, and every part thereof, the plaintiff and the defendant respectively resided and were out of the jurisdiction and dominion aforesaid, to wit, at Naples aforesaid and were then subject and amenable to the laws then and there in force. And that, under and by virtue of the laws of that country, *proceedings were afterwards*, and before the commencement of this suit, and whilst the plaintiff and defendant were resident at Naples aforesaid, and out of the jurisdiction and dominion aforesaid, and subject and amenable to the laws then and there in force, *duly taken by and at the instance of the plaintiff* before Ferdinando Boccia, then and there being Royal Judge of the Court of the circuit of the Chiaja in Naples, then and there sitting as correctional Judge according to the articles of the penal procedure laws of that country then and there in force, and having jurisdiction in that behalf for the said trespasses in the declaration mentioned, except as aforesaid. And that, according to the laws of the said country and place where the said alleged trespasses were committed, and where the said proceedings were taken as aforesaid, *the defendant was not*, at the time of the commencement of this suit, nor at the time when the said trespasses were committed, nor *at any time thereafter, liable to be sued by the plaintiff in any civil action or other proceeding [221 to recover damages for the alleged trespasses to which this plea is pleaded, nor liable to any other proceedings in respect of the said trespasses to which this plea is pleaded, except those taken and instituted as aforesaid under the laws aforesaid, and which are still pending and undetermined in the said Court at Naples aforesaid.

Second: (except as to the imprisonment of the plaintiff).—That the

said alleged trespasses were, and every part thereof, was, committed out of the jurisdiction and dominion of the Queen of England, and out of the jurisdiction of this Court, to wit, at Naples, and not elsewhere. And that, at the time of the committing of the said trespasses and every part thereof, the plaintiff and the defendant respectively resided and were out of the jurisdiction and dominion aforesaid, to wit, at Naples aforesaid, and were then subject and amenable to the laws then and there in force. And that, under and by virtue of the laws of that country, proceedings were afterwards, and before the commencement of this suit, and whilst the plaintiff and the defendant were resident at Naples aforesaid, and out of the jurisdiction and dominion aforesaid, and subject and amenable to the laws then and there in force, duly taken before Ferdinando Boccia, then and there being Judge of the Court of the circuit of the Chiaja in Naples, then and there sitting as correctional Judge, according to the articles of the penal procedure laws of that country then and there in force, and having jurisdiction in that behalf for the said trespasses in the declaration mentioned (except as aforesaid). And that, according to the laws of the said country and place where the said alleged trespasses were committed, and where the said proceedings were so taken as aforesaid, the defendant was not, at the time of the commencement of this *222] suit *nor at the time when the said trespasses were committed, nor at any time thereafter, liable to be sued by the said plaintiff. And that he could not recover any damages in a civil action or other proceeding for the alleged trespasses to which this plea is pleaded until the defendant had been condemned and found guilty of those trespasses, or some part thereof, in the said penal proceedings, and which said penal proceedings, before and at the time of the commencement of this suit, were and still are pending and undetermined; and the defendant has not been condemned or found guilty of the offences and trespasses, or any part thereof, charged by such penal proceeding.

Third: as to the imprisonment of the plaintiff.—That the said alleged trespasses were committed out of the jurisdiction and dominion of the Queen of England and out of the jurisdiction of this Court, to wit, at Naples and not elsewhere. And that, at the time of the committing the said trespasses, the plaintiff and the defendant resided and were out of the jurisdiction and dominion aforesaid, to wit, at Naples aforesaid, and were then subject and amenable to the laws then and there in force. And that, according to the law of the said country and place where the said alleged trespasses were committed, the defendant was liable to certain penal proceedings for the said imprisonment, if not authorized by the law of the country where the same took place. And that, according to the law of that country, no civil action or other proceedings could or can be maintained to recover damages for the alleged imprisonment, if illegal, until after the defendant had or has been condemned and found guilty of the illegal imprisonment in such penal proceedings as aforesaid. And that the defendant had not, before the commencement of this suit, nor has he yet, been condemned in such penal proceedings as last aforesaid, nor hath the plaintiff hitherto instituted or taken any such penal

*proceedings against the defendant, or endeavoured to procure him to be condemned or found guilty of the said alleged imprisonment. [*223]

Replication to first plea.—That the plaintiff and the defendant respectively, at the times of the committing of the said trespasses to which that plea is pleaded, were and still are liege subjects of our Sovereign lady the Queen Victoria, and subjects of Great Britain.

There were similar replications to the second and third pleas.

The plaintiff also demurred to the pleas.

Honyman (with whom were *Lush* and *H. T. Jenkins*) argued for the plaintiff in last Easter Term (April 30).—The pleas afford no answer to the action. The first plea admits the assault, but alleges that the plaintiff is not entitled to compensation, because by the law of Naples the defendant is not liable to be sued in any civil action or other proceedings to recover damages. The validity of contracts is determined by the *lex loci contractus*, but the mode of enforcing them depends on the *lex fori*: *De la Vega v. Vianna*, 1 B. & Adol. 284 (E. C. L. R. vol. 20), *The British Linen Company v. Drummond*, 10 B. & C. 903 (E. C. L. R. vol. 21), *Don v. Lippman*, 5 Cl. & F. 1. *Mostyn v. Fabrigas*, Cowp. 161, is an express authority that an action of trespass will lie in this country for an assault and false imprisonment committed in a foreign country. [POLLOCK, C. B.—Sir T. Picton, when governor of the island of Trinidad, in the West Indies, was indicted in this country and tried before Lord Ellenborough for a misdemeanor committed in Trinidad.(a)] There is a distinction in this respect between local and transitory actions. Trespass will not lie in this country for breaking into a *dwelling-house in a foreign [*224] country, because the action *quare clausum fregit* is local in its nature: *Doulson v. Matthews*, 4 T. R. 503. But an action to recover damages for an injury to the person is transitory, and may therefore be brought in this country notwithstanding the injury was committed abroad. In Story's *Conflict of Law*, chap. xiv. § 554, it is said "that by the common law personal actions, being transitory, may be brought in any place where the party defending can be found; that real actions must be brought in the *forum rei sitæ*, and that mixed actions are properly referable to the same jurisdiction." That distinction was recognised so long ago as the year 1665, in a case of *Skinner v. The East India Company*, cited in *Mostyn v. Fabrigas*, Cowp. 167, 168, where the twelve Judges certified that the Courts at Westminster could give relief for trespasses to the person and personal property notwithstanding they were committed beyond the seas, but for trespasses to the realty there was no relief in those Courts. In *Pisani v. Lawson*, 6 Bing. N. S. 90, 94 (E. C. L. R. vol. 37), Tindal, C. J., in the course of the argument, said: "Suppose an Englishman beats a Frenchman at Boulogne, and then comes to England, would not the Frenchman have a right to sue for the assault in our Courts?" In *Rafael v. Verelst*, 2 W. Black. 983, 1055, it was held that trespass would lie for procuring, by awe, fear, and threats, an independent native prince to imprison the plaintiff in his dominions in India. The same law prevails in America: *Smith v. Bull*, 17 Wendell 323. Formerly it was necessary to allege that the trespasses were com-

(a) How. St. Tr., vol. 30, p. 226.

mitted "against the peace of our lady the now Queen," but that was a mere fiction of law, and need not have been proved. Nothing is disclosed by the pleas with reference to the law of Naples which prevents this action being brought. Where there is no conflict between the law of this country and a foreign *country, the former must *225] prevail. It is not true that by the law of nations the right to sue in this country must be determined according to the law of the country in which the cause of action arose. Mr. Justice Story, in his *Conflict of Law*, chap. viii., § 326, cites with approbation the doctrine laid down in *Potter v. Brown*, 5 East 124, 131, by Lord Ellenborough, who said, "We always import together with their persons the existing relations of foreigners as between themselves, according to the laws of their respective countries, except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference." Mr. Justice Story then proceeds to say that Mr. Chancellor Kent has laid down the same rule in his *Commentaries* as stated by Huberus and Lord Ellenborough, and has said "that when the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land." The second and third pleas seem to proceed on some supposed analogy to the rule of law that a felony cannot be made the foundation of a civil action: *Stone v. Marsh*, 6 B. & C. 551, 564 (E. C. L. R. vol. 13); and that, before the party injured by a felonious act can seek civil redress for it, the matter must be disposed of by the proper criminal tribunal: *Crosby v. Leng*, 12 East 409. But assuming that by the law of Naples a person who has been assaulted and imprisoned cannot obtain compensation in damages, the comity of nations does not require the Courts of this country to recognise such a law. In *Cammell v. Sewell*, 5 H. & N. 728,† Byles, J., observed that in his opinion the comity of nations would not recognise the law of a particular country which was at variance with the general maritime law of the world. In Story's *226] *Conflict of Law*, chap. viii., §§ 258, 259, *numerous instances are given of contracts against morals, religion, and public policy, which, even though they might be valid in the country in which they were made, could not be enforced in this country. On the other hand, actions have been maintained in this country for adultery committed abroad. If no action will lie until criminal proceedings have been taken in Naples, the defendant might avoid all responsibility by quitting that country. Every plea to the jurisdiction of the Court ought to give some other Court by which the matter may be tried: *Rex v. Johnson*, 6 East 583. Moreover, the first plea does not aver that by the law of Naples damages cannot be recovered for these trespasses, but only that the defendant is not liable to any proceedings except those which were then pending. It is a bad plea in abatement of the pendency of another proceeding for the same cause in a foreign court: *Laughton v. Taylor*, 6 M. & W. 695,† *Cox v. Mitchell*, 7 C. B., N. S. 55 (E. C. L. R. vol. 97). [BRAMWELL, B., referred to *Leroux v. Brown*, 12 C. B. 801 (E. C. L. R. vol. 74.)] The pleas disclose mere matter of procedure, which does not affect the plaintiff's right to sue for damages in the Courts of this country. It

is a general principle that the penal laws of one country cannot be taken notice of by another: Story's Conflict of Law, chap. xvi., § 620.

Hawkins (with whom was *Archibald*), for the defendant (*May* 5).—The doctrine laid down in *Mostyn v. Fabrigas*, Cowp. 181, is not disputed. The first plea states (and it is admitted by the demurrer) that, according to the law of Naples, the defendant never was liable to be sued by the plaintiff in any civil action or other proceeding to recover damages. Contracts made in a foreign country cannot be enforced in this country unless they are conformable to the law of the foreign country. The same principle applies to torts. The *ground on which an action is maintainable in this country on a contract made abroad is that, by the comity of nations, this country recognises the law of the foreign country. [POLLOCK, C. B.—Suppose, in a foreign country, there was no redress for slander, would that prevent an Englishman who was slandered from bringing an action in this country?] In the note to *Mostyn v. Fabrigas*, in Smith's Lead. Cas., vol. 1, p. 640, 5th ed., it is said: "With respect to transitory causes of action which have accrued abroad, like that in the principal case of *Mostyn v. Fabrigas*, it must be remarked that, although the Courts of this country will entertain them, still they will, on adjudicating on them, be governed by the laws of the country in which they arose. The distinction laid down in all the cases of this description is between the cause of action, which is to be judged of with reference to the law of the country where it originated, and the mode of procedure, which must be adopted as it happens to exist in the country where the action is brought." Therefore, whatever is a justification where the act was committed, is a justification where the action is brought; and whatever is a bar to any action where the act was committed, is a bar where the action is brought: *The General Steam Navigation Company v. Guillou*, 11 M. & W. 877.† [MARTIN, B.—It does not appear that the Judge at Naples might not have awarded damages for the assault.] The first plea expressly negatives any right in the plaintiff, by the law of Naples, to recover damages. •[MARTIN, B.—It says that the defendant was never liable to any other proceedings in respect of the said trespasses *except those taken*, and, consistently with that allegation, the proceedings may have been for the recovery of damages.] This case is similar to that of a person who, having been assaulted in Scotland or Ireland, has taken proceedings before a magistrate in London, in which case *the certificate of the magistrate that the complaint was dismissed [*228 would be a bar to any action for the same assault: *Costar v. Hetherington*, 28 L. J., Mag. Cas. 198. [MARTIN, B.—Suppose that, by the law of France, the owner of a ship was not responsible for any act of his servant, would that afford a defence to an action against the master in this country?] There is no authority that an action can be maintained here for a wrong done in a foreign country, for which there is no remedy by action in that country. The pleas do not disclose mere matter of procedure, but show that the plaintiff has no remedy by action. That is no more matter of procedure than a plea of the Statute of Limitations, or a plea under the Statute of Frauds. The second and third pleas show that it is a condition precedent to

the right to maintain this action that the defendant should have been found guilty of the trespasses in penal proceedings. If a person injured by a felonious act brought an action against the person charged with committing it, would it not be a good plea in bar that the matter had not been disposed of by a criminal tribunal? If so, the second and third pleas are not pleas in abatement, but good pleas in bar of the action.—He also referred to *White v. Spettigue*, 13 M. & W. 603.†

Honyman replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—It is concluded by authority that the circumstance of the assault and battery having been committed in a foreign country is in itself no impediment to an action being maintained for it here. Then what is the meaning of the first plea? The defendant argues *229] that it *means that proceedings to punish him, the defendant, have been taken in Naples, and that, except those proceedings, none can there be taken, and that therefore none can here be taken to recover damages. But we hold it means that proceedings have been taken in the Neapolitan Court, and that except those proceedings none can there be taken. If so, it does not negative that those are proceedings in which a compensation or damages may be recovered. We hold this to be the natural meaning of the words, and are confirmed in that opinion by this, that the argument of the defendant makes the substance of the plea to be, that no civil action for the wrong complained of is maintainable in Naples, and that in respect of it no damages or compensation can be there recovered. If so, it would have been easy to say so in so many words; and, applying the rule to a reasonable extent, that pleadings are to be taken most against the pleader, we put the construction we have on this plea. Then it comes to this, that this is a wrong for which an action would lie here, and for which (as it is not negatived) we must assume an action will lie in Naples, but in respect of which proceedings are pending in Naples at the plaintiff's instance. This, however, is no defence. It cannot be a defence in bar of the action. It would be no answer, even in abatement of the writ, that an action was pending here in an inferior Court, and how in law or reason can it be, that it is pending in a foreign Court, when the action is in no sense local? The case of *Cox v. Mitchell*, 7 C. B., N. S. 55 (E. C. L. R. vol. 97) is an authority to show that an action pending abroad for the wrong is no ground for staying proceedings in an action here. The first plea therefore is bad.

The other two pleas demurred to allege in effect this, that by the *230] law of Naples, until the defendant has been *criminally condemned for the matters complained of, no action can be maintained against him for damages, and that he has not been so condemned. These pleas assume, therefore, that the acts complained of are the subject of civil proceedings in Naples to recover damages, but that, as a preliminary, there must be a penal proceeding and conviction. We think this furnishes no defence. It is a matter of procedure which is to be governed by the *lex fori*. The plaintiff's cause of action is the assault and battery. Our Statute of Limitations would run from its occurrence; and it would be strange that, if the criminal proceedings in Naples lasted for six years, the plaintiff lost his remedy here. Besides, if the defendant withdraws from the juris-

diction of the Neapolitan tribunals, we must assume he prevents the very proceeding which is, by their law, necessary to perfect the plaintiff's power to sue: he does not substitute another mode of proceeding criminally here. He would therefore, by his own act, deprive the plaintiff of a remedy for the wrong he has done. Besides, the reason of the thing ceases before our tribunals. For certain police and municipal purposes the foreign law says that, when the act complained of is of a criminal character, criminal proceedings shall be taken before civil; but that neither is nor can be a consideration with us. Suppose a man here stole a chattel and went to New York, would it be reasonable that the tribunals there should refuse to entertain a suit by the owner of the article against the thief till there had been a prosecution here? Before the extradition treaties such an objection would be obviously preposterous, and is not really less so now. But this is the defence raised by the second and third pleas demurred to, and for the reasons we have given we think them bad.

WILDE, B.—I heard only a part of the argument, but I *do [*231 not dissent from the judgment which has been delivered.

Judgment for the plaintiff.

The defendant having taken proceedings in error on the above judgment, the case was argued, in the following Michaelmas Vacation (Dec. 1), by

Archibald (with whom was *C. Pollock*), for the defendant.—Under the circumstances stated in the pleas, this action cannot be maintained. The plaintiff's remedy for the assault must be determined by the law of Naples, and whatever is a defence there is also a defence here. *Mostyn v. Fabrigas*, Cowp. 161, 173, does not effect the present question. All that case decided was, that an action might be maintained in this country for an assault committed abroad. The difficulty which arose as to venue was obviated by a fiction of law. The only passage in the judgment in *Mostyn v. Fabrigas* which bears on this question is in favour of the defendant:—"It does not follow from hence that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him." [BLACKBURN, J.—The pleas do not allege that the trespasses were justified by the law of Naples, but only that there is a peculiar mode of procedure in that country in respect of them. CROMPTON, J.—You must contend that, supposing no action could have been maintained in a foreign country for criminal conversation committed there, no such action could formerly have been maintained in this country.] If by the law of a foreign country there is no right to damages for a personal injury, none are recoverable here. The pleas show that *the assault was committed at [*232 Naples, where both parties resided, and that they were subject to the law of Naples; therefore their rights and liabilities must depend on the law of that country. A justification by the law of the country in which the alleged wrong was done is a justification everywhere; but the right to compensation, the nature and extent of it, and the mode in which it is to be enforced, must be determined by the law of the country in which the injury occurred. [CROMPTON, J.—

According to that argument, the pleas ought to show that the assault was justified by the law of Naples. The first plea merely says that the plaintiff is not entitled to recover damages except by a criminal proceeding.] It alleges in substance that the only remedy for the injury is by a penal proceeding. In Westlake's International Law, sect. 240, p. 224, it is said, "The legal character and consequences of an act must certainly depend on the jurisprudence of the country where it is done, and not on that of any spot to which its consequences may extend. The damage is not an injury, unless it results from conduct prohibited by the law which governs the agent." By the comity of nations, the Courts of this country respect the policy of the foreign law, and if that provides that no civil action shall be maintained for an assault, none is maintainable here. The obligation arising from a tort depends as much on the law of the country in which it is committed, as the validity of a contract depends on the law of the country in which it is made: Westlake's International Law, sect. 237, p. 222; *Regina v. Lesley Bell*, C. C. 220. There is nothing contrary to natural justice in providing that there shall be no remedy for an assault except by a criminal proceeding. [CROMPTON, J.—The pleas do not show that by the law of Naples no compensation can be *233] awarded in a criminal proceeding.] *No action can be maintained in this country for an alleged wrong committed in a foreign country, if the act was justifiable there: *Dobree v. Napier*, 2 Bing. N. C. 781 (E. C. L. R. vol. 29). Compensation for injury committed in a foreign country depends on the law of that country: *Ekins v. The East India Company*, 1 P. Wms. 395, in error, 2 B. P. C. 382; *Law v. The East India Company*, 4 Ves. 824. [WILLES, J., referred to *Gibbs v. Fremont*, 9 Exch. 25.†] In *Santos v. Illidge*, 8 C. B., N. S. 861, (E. C. L. R. vol. 98), it was held by a majority of the Judges in the Exchequer Chamber that a contract might be enforced for the sale of slaves, lawfully held in a foreign country where the possession and sale of slaves was lawful. *Madrazo v. Willes*, 3 B. & Ald. 353 (E. C. L. R. vol. 5), *Buron v. Denman*, 2 Exch. 157,† and *Cammell v. Sewell*, 5 H. & N. 728,† show that the right to maintain an action for damages in respect of a tort committed in a foreign country depends on the law of that country. Moreover, the plaintiff having resorted to the foreign tribunal, this Court will not interfere until these proceedings are determined.

Honyman appeared for the plaintiff, but was not called upon to argue. *Cur. adv. vult.*

The following judgments were now delivered.

WIGHTMAN, J.—We are all of opinion that the second and third pleas in this case are bad, and afford no answer to the action. They admit the right to compensation in damages for such trespasses as those in the declaration; but state that by the Neapolitan law they cannot be recovered until certain penal proceedings have been commenced and determined there. This is an objection to procedure *234] *merely, which must be determined by the *lex fori*, and not the *lex loci*; and the second plea indeed in effect seems to amount to no more than *auter action pendant* in a foreign country, which is clearly not sustainable.

The main argument for the plaintiff in error, however, was founded

upon the first plea, which, as Mr. *Archibald* contended, asserted that by the law of Naples no damages were recoverable in respect of the alleged trespasses mentioned in the declaration. My learned brothers are of opinion that the plea does not contain any averment that damages might not be recovered by the law of Naples for the alleged trespasses in some form of procedure or other, and without such an averment or equivalent expressions, it may be taken as against the defendant in the action that they might be recovered; and that, if that be so, the question is one of form merely, and governed by the *lex fori*; and there is nothing to oust the jurisdiction of the English Courts to entertain an action to recover damages in such a case.

I agree with the rest of the Court if the construction of the first plea is that which they suggest; but, speaking for myself only, I am of opinion that if Mr. *Archibald's* construction of the plea be correct, and that by the law of Naples, as stated in the first plea, no damages are recoverable in any form of procedure there, an action is nevertheless maintainable in England by one British subject against another British subject for the trespasses mentioned in the declaration. The construction or validity of contracts may, as a general rule, depend upon the *lex loci* where the contract was made, but the rules relating to contracts are not applicable to this case; and I am not aware of any rule of law which would disable a British subject from maintaining an action in this country for damages against another British subject for an assault and battery committed by him in a foreign country, merely because no damages for such trespasses ^{are} recoverable by the law of the foreign country; and without any allegation [*235 that such trespasses were lawful or justifiable in that country. By the law of England, an action to recover damages for an assault and battery is transitory, and whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject.

I think the first plea bad, either upon this ground or upon that suggested by my learned brothers; and the judgment of the Court below will therefore be affirmed.

WILLIAMS, J., said.—I entirely concur with the former part of my brother Wightman's judgment. With respect to the latter part, it is not necessary to express an opinion, but I am desirous of saying that, as at present advised, I am not prepared to assent to it.

CROMPTON, J., said.—It is not necessary to decide the latter and more important question, whether the law be as my brother Wightman has propounded it. I think that is a matter of some difficulty and doubt, and I do not wish to express any opinion upon it, because this case may be decided on the other ground.

Looking at these pleas, I agree with the view of the majority of the Court that they do not aver that no compensation in damages is recoverable by the law of Naples for these trespasses. Such a state of the law can scarcely be supposed, and I do not believe it exists. It is to be lamented that such a loose mode of pleading is adopted in

*236] "the present day, that pleas may mean either one thing or another. But looking at the first plea, I think it does not show that no compensation in damages is recoverable. It alleges that proceedings were taken at Naples before a judge "having jurisdiction in that behalf, for the trespasses in the declaration mentioned." Any one would suppose from that, that the judge had jurisdiction over the whole matter. The plea then alleges that the defendant is not "liable to be sued by the plaintiff in any civil action or other proceeding to recover damages for the alleged trespasses." Whether that means that the defendant is not liable to be sued in any civil action or other *civil* proceeding may be doubtful. If it means any civil action or other proceeding in contradistinction to a criminal proceeding, it affords no answer, because it admits that the plaintiff might recover damages in the proceedings under the penal procedure laws. The plea then says, "nor liable to any other proceedings in respect of the said trespasses, except those taken and instituted as aforesaid under the laws aforesaid." If that means that a man, however assaulted, can recover no compensation in damages unless he resorts to those proceedings, it admits that he may recover it in *that* form.

On this construction of the plea, the question becomes one of procedure only, and on that ground I agree that the judgment of the Court below ought to be affirmed.

WILLES, J., said.—I concur with the opinion of the other members of the Court as expressed in the judgment delivered by my brother Wightman. As to what our decision would be, if the plea do not bear the construction now put upon it, I need not express any opinion. I am far from saying that I differ from any part of the judgment of my brother Wightman; but I entirely concur in thinking, that
*237] "as the plea does not aver that there is any positive law in Naples against the recovery of damages for an assault, we must assume that they may be recovered in some form of proceeding.

BLACKBURN, J., said.—I also agree that the judgment of the Court below ought to be affirmed. Construing the first plea as I do, it merely amounts to this, that the Judge of the Court of the Circuit of Chiaja in Naples had exclusive jurisdiction over all proceeding for personal trespasses, whether civil or criminal, and that proceedings in respect of those trespasses were still pending in that Court. I construe the plea as amounting to that, and no more. Then the plea merely discloses matter of procedure, and does not show that by the law of Naples this cause of action is no cause of action there. Viewing the first plea in that light, I think it bad.

If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners. The point however is not now raised, and it is unnecessary to express any opinion upon it.

Judgment affirmed.

*AMOS and Another v. SMITH. *June 5.* [*288

In the year 1833, the plaintiffs, trustees of a marriage settlement, lent to the husband, at interest, some of the money settled to the separate use of his wife, on security of the joint bond of the husband and the defendant. No interest was paid, but, on the 31st October 1847, it was arranged between the plaintiffs and the husband and wife that she should give the plaintiffs her receipt for the interest up to that date, which she accordingly did. She afterwards from time to time gave receipts for each half-year's interest up to November, 1860. No money ever passed.—Held, that the transaction amounted to a payment or satisfaction of the interest so as to take the case out of the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 5.

ACTION on a bond for payment by the defendant to plaintiffs of 1636*l*.

Plea.—That the alleged causes of action did not accrue within twenty years before the suit.

Replication.—That the defendant within twenty years before the suit made and acknowledged, to wit, by part payment and part satisfaction on account of the interest then due on the said bond, that the debt in the declaration mentioned then remained unpaid and due to the plaintiffs.—Issue thereon.

At the trial, before Martin, B., at the Middlesex Sittings after Easter Term, the following facts appeared:—The plaintiffs were trustees of the marriage settlement of John Woodhams and Ellen his wife. On the 1st of November, 1833, the plaintiffs lent to John Woodhams 816*l*. of the trust-money which was settled to the separate use of his wife, upon the security of a bond executed by him and the defendant Smith as surety; and conditioned for payment of 816*l*. and interest on the 1st of May then next. No interest was paid, but on the 31st of October, 1847, it was arranged between the plaintiffs and J. Woodhams and his wife that she should give the plaintiffs her receipt for the interest up to that date, and that it should be considered as paid. She accordingly signed and delivered to the plaintiffs the following receipt:—

“1st Nov. 1847.

“Received of James and Daniel Amos, the trustees of my marriage settlement, the sum of 240*l*. for interest due *on 816*l*., at 5 per cent. on bond given by Mr. John Woodhams and Mr. James Smith up to this date. [*239

“HELEN WOODHAMS.”

Receipts in the same form were subsequently given, but no money was ever paid. The last receipt was dated the 1st February, 1861, for interest up to the 1st November, 1860. The marriage settlement contained the usual provision that the receipt of the wife should be a sufficient discharge to the trustees. The defendant had never been applied to for payment of interest, nor was he aware of the arrangement which had been made between the plaintiffs and J. Woodhams and his wife. J. Woodhams having become insolvent, the present action was brought.

The learned Judge was of opinion that the transaction amounted to a payment or satisfaction of the interest within the meaning of the 3 & 4 Wm. 4, c. 42, s. 5, and directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter the verdict for him.

H. & C., VOL. I.—10

Lush, in the present Term (May 30), obtained a rule nisi accordingly; against which

Bovill and *H. Shield* now showed cause.—The question is, whether there has been any part payment or part satisfaction on account of the interest due on the bond, within the meaning of the 3 & 4 Wm. 4, c. 42, s. 5. The arrangement between the parties was in effect a payment or satisfaction of the interest. [BRAMWELL, B.—Suppose an action had been brought for the interest in respect of which the receipts were given, would not the transaction have been an answer under a plea of payment? POLLOCK, C. B.—It was a payment by settlement of accounts. When two persons meet, and one says to the other "I owe you so much money, and you owe me so much," but instead of paying over the money they agree to settle the account by *240] setting off one sum against the other, that is a payment by settlement of account: *Ashby v. James*, 11 M. & W. 542.†]

The Court then called on

Lush and *Hance*, to support the rule.—It is conceded that if two persons, mutually indebted to each other in the same amount, meet and agree to settle their accounts without any money passing, that would be a payment or satisfaction of their respective debts. But in this case the defendant was no party to the arrangement between the plaintiff and Woodhams and his wife. In *Bodger v. Arch*, 10 Exch. 333,† the agreement was founded on a good consideration; but this is not a bonâ fide transaction. The plaintiffs committed a breach of trust, and for their own protection requested the husband to procure his wife's receipts for the interest on the trust-money. Suppose the husband had acknowledged in writing that the debt was due, that would not have rendered the defendant chargeable. An acknowledgment has no more effect under the 3 & 4 Wm. 4, c. 42, than under the 9 Geo. 4, c. 14, s. 1; and under the latter Act there is a distinction between an acknowledgment in writing and part payment by one of several joint contractors; the effect of an acknowledgment is confined to the individual who makes it, but part payment by one of several joint contractors operates against all. The reason given by Tindal, C. J., in *Wyatt v. Hodson*, 8 Bing. 309, 312 (E. C. L. R. vol. 21), is that "payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." Again, suppose the wife had acknowledged in writing that part of the principal had been paid, that would not have been sufficient to take *241] the case out of the statute. There is a *wide difference between a deliberate act of payment and the giving a receipt when in fact no money has been paid. [BRAMWELL, B.—The wife could not in equity recover from the trustees the interest in respect of which she gave the receipts.] Whatever may be the effect of this transaction in equity as between the wife and her trustees, it does not in law amount to payment.

MARTIN, B.—I am of opinion that the rule ought to be discharged. The question, which arises upon the 3 & 4 Wm. 4, c. 42, s. 5, is whether there has been any payment which will operate as a satisfaction for the purpose of keeping alive this debt. In my opinion whatever would prove a plea of payment is sufficient for this purpose. The husband ought to have paid the trustees the interest as it became due, and the

trustees ought to have handed it to the wife; and if that had been done, beyond all doubt it would have taken the case out of the Statute of Limitations. Then the question is whether what has been done is not substantially the same thing. I am of opinion that it is. If the money had been paid by the husband to the trustees, and immediately handed over by them to the wife, that would have been a mere idle ceremony. There are numerous cases which establish that there may be a payment by settlement of accounts. When two persons indebted to each other meet and agree to set off their respective debts, that is not a mere settlement of account, but is as much a payment as if the money had passed between them. *Bodger v. Arch*, 10 Exch. 833,† is an authority in point. It is said that case is distinguishable, on the ground that the defendant, who was liable to pay the interest, expended the money in the maintenance of the plaintiff's child; but I think it is not, and if the evidence be true this is as much a real and bona fide *transaction as that. I feel bound to say that we [*242 granted the rule because the point was reserved, and not from any doubt which we entertained as to it.

BRAMWELL, B.—I am of the same opinion. It is scarcely necessary to add anything, and I will only advert to the effect of the words of the Act of Parliament, which are, "part payment or part satisfaction," I cannot for a moment doubt that the interest has been *satisfied* by the transaction which took place. I think that the wife could not maintain a suit in equity against the trustees for enforcing payment of the interest; but however that may be, I am clearly of opinion that there has been a satisfaction of the interest, so as to take the case out of the Statute of Limitations.

CHANNELL, B., concurred.

Rule discharged.(a)

(a) See *Foster v. Dawber*, 6 Exch. 839.†

The construction which is put upon statutes of limitations still varies radically, and this evil will continue so long as different theories are entertained in reference to the object for which such statutes are enacted. Hence it is an essential preliminary, for the correct understanding of any question arising under a statute of limitations, to ascertain the theory which controls its interpretation.

There are three principal views which compete for judicial favour.

1. The leading view is that a *new* promise, founded on the consideration of the old debt, must be established in order to take a case out of the statute. Such a promise is like one made by a debtor who has been discharged under a bankrupt or insolvent law, or by an

infant to pay a debt which was not contracted for necessities. The older authorities for this view are fully collected in 1 *Smith's Leading Cases*, sixth American edition, 1855, under the case of *Whitcomb v. Whiting*, and in *Angell on Limitations*, third edition, 1854, ch. 20. It is only necessary to add the recent cases: *Winchell v. Hicks*, 4 *Smith* (N. Y. 1859) 558; *Creuse v. Defiganiere*, 10 *Bosworth* (New York Superior Court 1863) 122; *McNamee v. Tenny*, 41 *Barbour* (N. Y. 1864) 495; *Shitler v. Bremer*, 11 *Harris* (Pa. 1854) 413; *Burr v. Burr*, 2 *Casey* (Pa. 1856) 284; *Clark v. Maguire*, 11 *Id.* (1860) 259; *Shaffer v. Shaffer*, 5 *Wright* (Pa. 1861) 51; *Reed v. Reed*, 10 *Id.* (1863) 239; *Wolfensberger v. Young*, *Id.* 516; *Ridgway v.*

English, 2 Zabriskie (N. J. 1850) 409; Smith v. Campbell, 5 Harrington (Del. 1852) 380; Felty v. Young, 18 Maryland (1862) 163; Tazewell v. Whittle, Grattan (Va. 1856) 329; Broddie v. Johnson, 1 Sneed (Tenn. 1853) 464; Emmons v. Overton, 18 B. Munroe (Ky. 1857) 643; Vass v. Conrad, 7 Jones L. (N. C. 1859) 87; Gilmer v. McMurray, Id. 479; Johnson v. Ballard, 11 Richardson (S. C. 1857) 178; Dawson v. Godkins, 28 Georgia (1859) 310; Bates v. Bates, 33 Alabama N. S. (1858) 102; Patterson v. Cobb, 4 Florida (1852) 481; Smith v. Fly, 24 Texas (1859) 345; Bank v. Hatfield, 5 Arkansas (1845) 551; Newfield v. Blawn, 16 Iowa (1864) 297; Pritchard v. Howell, 1 Wisconsin (1853) 131. (In Cleveland v. Harrison, 15 Wis. (1862) 670, the position taken in Pritchard v. Howell was animadverted upon so far as it negatived the view that the statute established a rule for the presumption of payment.) Lowery v. Gear, 32 Illinois (1863) 382; Prenatt v. Runyon, 12 Indiana (1859) 179; Goodwin v. Buzzell, 35 Vermont (1861) 9; Wright v. Bartlett, 43 New Hampshire (1862) 548; Rhoades v. Allen, 10 Gray (Mass. 1857) 35; Cook v. Martin, 29 Conn. (1860) 63.

2. Another view treats the statute as raising a presumption of payment, which, however, may be rebutted by proof of an admission that the debt has not been paid. This view likens the statute to the legal presumption of the payment of a specialty in twenty years, which merely shifts the burden of proof at the expiration of that period. In support of this theory an argument of great force, derived from the history of the law upon this point, was made by a distinguished member of the Philadelphia Bar, in the Pennsylvania Law Journal for the year 1845, fourth volume, page 481. The class of cases, which sustains an action on the original under-

taking, instead of compelling a resort to the new promise (*Carshoe v. Huyek*, 6 Barbour (N. Y. 1849) 583; *Titus v. Ash*, 4 Foster (N. H. 1851) 319; *Reed v. Reed*, (Pa. 1863) 239; *Wright v. Bartlett*, 43 N. H. (1862) 548), shows the vitality of this view in spite of the nominal adoption of its rival theory. So do the cases which permit a partner, after dissolution (*Choate v. Patterson*, 7 Wendell (N. Y. 1831) 441; *M'Intyre v. Oliver*, 2 Hawks (N. C. 1822) 209), or an executor (*Larason v. Lambert*, 7 Halstead (N. J. 1831) 247; *Baxter v. Penniman*, 8 Mass. (1811) 133; *Tazewell v. Whittle*, 13 Grattan (Va. 1856) 329; *Johnson v. Ballard*, 11 Richardson (S. C. 1857) 178), or one of several executors (*Northcut v. Wilkinson*, 12 B. Munroe (Ky. 1851) 408), or a co-obligor or co-contractor (25 Vermont (1853) 390; *Bank v. Hatfield*, 5 Ark. (1845) 551; *Craig v. Callaway Co. Court*, 12 Missouri (1848) 97; *Caldwell v. Sigourney*, 19 Conn. (1848) 37), to revive a debt barred by the statute, establish the fact that the presumption-theory is not eradicated or "exploded," as is frequently said, but still retains a strong hold upon the judicial mind.

3. A suggestion which was advanced and well put in the American Law Journal for August 1848, Am. L. J. 1, New Series 63, has been recently and abruptly adopted by the Supreme Court of Pennsylvania: *Yaw v. Kerr*, 11 Wright (1864) 333. The first view, to wit, of a new promise, had been distinctly professed—though the learned judge admitted that it was not consistently carried out—only the preceding year, *Reed v. Reed*, 10 Wright (1863) 239. This last doctrine is that the operation of the statute is prevented by the establishment of a *waiver* on the part of the debtor, for whose exclusive benefit the act was introduced. The debtor may at his option waive the statute by omitting to plead it, or by matter in *pais*, which is susceptible of proof,

like any ordinary fact. Woodward, C. J., thus states the present law of Pennsylvania upon this point: "With us the action is always brought upon the original undertaking, and when the statute is pleaded, the new promise is proved, *not to raise a cause of action, but to show that the legal objection to the old promise has been waived.* The plea of the statute is addressed, not to the contract, but to the remedy. 'I admit the promise and contract,' is its language in effect, 'but you delayed your suit so long that you cannot maintain it after six years.' The reply is, in substance, "True, there is such a rule of law, but you waived it by renewing your promise within six years, and therefore it cannot avail you to defeat my action.' *In this manner the action is reserved from the operation of the statute. But the action on what? Obviously, and always, the action on the original undertaking. Thus we*

avoid all entanglements about the consideration of the new promise. It needs no consideration, for it is not sued upon." If anything beyond the well-directed precision of this language is needed to establish the fact that Chief Justice Woodward has adopted the theory of a waiver, it may be found in *Suter v. Sheeler*, 10 Harris (1853) 310, where he refers with approbation to the article alluded to above. See also *Beasley v. Evans*, 35 Miss. (1858) 192, where the court seems to treat the acknowledgment as a waiver.

The principal case, in which receipts were given, though no actual payment was made, might stand with any of the three views which have been stated. Still, it would accord better with the doctrine of an admission or waiver than of a new promise, under which head, however, it was classed. See also *Cockrill v. Sparkes*, *infra* 699.

HENRY FLEMING v. HENRY FLEMING. June 5.

A testator devised as follows:—"I give and bequeath to my son Edward Fleming all that dwelling-house, &c. (now in the occupation of my son John), during his natural life, and at his death to descend to my grandson Henry Fleming and his heirs for ever." The testator had two grandsons named Henry Fleming, the plaintiff, who was the son of the testator's son Edward, and the defendant who was the son of the testator's son John.—Held, that the proof of that fact raised an ambiguity in the will, as to which of his two grandsons the testator meant, and that parol evidence was admissible to explain it.

EJECTMENT to recover possession of a dwelling-house and premises, situate in Boutport Street, Barnstaple, in the county of Devon. The defendant defended as landlord.

At the trial, before Byles, J., at the last Devonshire Spring Assizes, the following facts appeared.—The plaintiff claimed title to the premises in question under the will of *one Robert Fleming, the [*248 owner in fee. Robert Fleming had (amongst other children) two sons, John Fleming and Edward Fleming. The plaintiff was the son of Edward Fleming, and the defendant was the son of John Fleming. The will of Robert Fleming, dated the 27th November, 1823, was (so far as material to the present case) as follows:—"I give and bequeath to my son, Edward Fleming, all that dwelling-house, with the appurtenances, situate in Boutport Street (now in the occupation of my son, John Fleming), during his natural life, and at his death to descend to my grandson, Henry Fleming, and his heirs for ever, without the power to sell or alienate the same. I give and

bequeath to my daughter, Ann Rew, all that dwelling-house, with the appurtenances, situate in Boutport Street, now in the occupation of Joseph Herring, during her natural life, and at her death to descend to my grandson, John Fleming, and his heirs for ever, without the power to sell or alienate the same."

After the death of the testator Edward Fleming entered into possession of the premises in question. He afterwards disposed of his life interest to his brother John Fleming, who received the rents up to the time of the death of Edward Fleming, which occurred on the 9th August, 1860. Upon the death of Edward Fleming, the defendant Henry Fleming entered into possession and received the rents of the premises in question.

Upon these facts, the defendant's counsel submitted that there was a latent ambiguity on the face of the will; and he proposed to show, by parol evidence, that the testator, when he mentioned his grandson Henry Fleming, intended the defendant Henry, the son of John, to be the object of his bounty. It was contended, on behalf of the *244] plaintiff, that the fact of the testator having two grandsons *of the name of Henry Fleming did not raise such a latent ambiguity in the will as to render parol evidence admissible to explain the testator's intention.

The learned Judge was disposed to think that there was no ambiguity; but he received the evidence, which in substance was that the defendant from his childhood had resided with the testator, who had been frequently heard to say that he should give the defendant the premises in question: that the testator's son, Edward Fleming, had left Barnstaple when he was very young and had settled in London: that the testator was not aware that he had a son, nor that he was married.

The learned Judge left it to the jury to say whether the testator intended to give the premises in question to his grandson, Henry, the son of Edward, or to his grandson, Henry, the son of John. The jury found that the testator meant to give them to his grandson, Henry, the son of John. The learned Judge then directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Collier, in last Easter Term, obtained a rule nisi accordingly, on the ground that parol evidence was admissible to show that the testator intended to devise the property in question to the defendant.

Montague Smith and *T. W. Saunders* now showed cause.—There is no latent ambiguity on the face of the will; and if the intention of the testator be collected from his words, it is evident that he meant to benefit Henry, the son of Edward. The principles on which evidence is admissible to explain a will were fully investigated in the case of *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363.† There the *245] testator devised lands *to his son John H. for life; and on his decease to the testator's grandson *John H.*, eldest son of the said John H., for life; and on his decease to the first son of the body of his said grandson John H. in tail male, with remainders over. At the time of making the will, the testator's son John H. had been twice married. By his first wife he had one son, *Simon*; by his second wife, an eldest son, John, and other younger children. It was held

that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will. Parol evidence is only admissible to explain a latent ambiguity, where the language of the testator applies equally to two or more persons or things. Here there are circumstances which indicate the intention of the testator. The plaintiff is the son of the testator's son Edward to whom a life estate is devised, and when the testator speaks of his grandson he must be taken to speak of the son of that son of his who was then particularly in his mind. Again, the testator uses the words, "and at his death to descend to my grandson Henry Fleming." [BRAMWELL, B.—It is obvious from the next clause that the testator does not use the word "descend" in the sense of descending from parent to child.] The premises in question were in the occupation of the testator's son John, the father of the defendant, and the fact of the testator devising them to his son Edward leads to the conclusion that he did not intend to benefit the family of his son John. In *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57 (E. C. L. R. vol. 6), the testator devised to *Matthew W.*, his brother, and *Simon W.*, his brother's son, a certain estate. The testator had three brothers, each of whom had a son of the name of *Simon*, living at the time of the testator's death. It was held, that *the proof of this fact did [*246 not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator as to the person intended; it being clear that the person entitled was *Simon*; the son of *Matthew*. So here, parol evidence is not admissible to raise an ambiguity, since it is apparent on the face of the will which grandson the testator meant. [CHANNELL, B.—When it appeared that the testator had two grandsons of the same name, an ambiguity was raised in the will, and then parol evidence was admissible to show which of his grandsons the testator meant.]

Collier appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B.—The rule must be absolute. It appeared by the evidence that the testator, having two grandsons of the name of *Henry Fleming*, mentions one of them in the same clause with his son *Edward*, the father of one of the grandsons, and it is contended that there is no ambiguity in the will, and parol evidence is not admissible to explain which of the two the testator meant, because he mentions his grandson *Henry* in the same clause with his son *Edward*. That circumstance raises a conjecture, but by no means disposes of the question. Inasmuch as evidence might be given that *Henry*, the son of *Edward*, was a person whom the testator never saw, and of whose existence he was not aware, how can it be said that the clause in the will conclusively shows that the testator meant by his grandson *Henry* the son of the person whom he mentions in that clause? The moment it appeared by the evidence that the testator had two grandsons of the name of *Henry*, a doubt arose which the name itself did not solve, and therefore evidence *was admissible to show that the testator had no intercourse with one of [*247 them; and inasmuch as the defendant was the testator's grandson, *Henry*, who lived with him, and concerning whom he made the

declarations, in my opinion the jury have properly found a verdict for the defendant.

BRAMWELL, B.—I am of the same opinion. The argument on behalf of the plaintiff is that there is no ambiguity on the face of the will, although it appears that the testator had two grandsons of the name of Henry, and that extrinsic evidence is not admissible to show which grandson he meant. I cannot assent to that. The argument founded on the word "descend" may be altogether disregarded, because the testator afterwards uses the same word in the sense of "go to," not in the sense of "descending" from father to son. What reason is there for saying that when the testator uses the words "my grandson Henry Fleming," it is to be presumed on the face of the will that he meant the grandson who is the son of his previously named son, Edward Fleming? If it cannot be presumed on the face of the will, as soon as it appears that there are two grandsons of the name of Henry there is an ambiguity on the face of the will, and parol evidence is admissible to explain it.

With respect to the authority relied on, *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57 (E. C. L. R. vol. 6), that case is very different. There the words were, "I give, devise, and bequeath unto *Matthew Westlake*, my brother, and to *Simon Westlake*, my brother's son, all that my fee simple messuage," &c.; and there is good reason for believing that by the words "my brother's son," the testator meant the son of that brother whom he had previously mentioned; for, if he did not, he would have said "the son of my other brother" (naming him). If the devise had been "unto *Matthew Westlake*, my brother, *248] and to *Simon Westlake*," my nephew, I am not sure that I should have come to the same conclusion. Here the words "my grandson Henry Fleming" do not mean Edward's son, because the testator, if he had meant the plaintiff, and not his other grandson, would in some way have connected the plaintiff with his son Edward. For these reasons I am clearly of opinion that the rule ought to be absolute.

CHANNELL, B.—I am also of opinion that the rule ought to be absolute. I am not dissatisfied with the verdict of the jury upon the evidence received; and the only question is, whether it was admissible. That depends on whether there is any ambiguity on the face of the will. It is said, that although it was proved that the testator had two grandsons of the name of Henry Fleming, there is no ambiguity on the face of the will, because the testator has used the words "descend to my grandson" Henry. But looking at the way in which the word "descend" is used in the subsequent clause, no importance can be attached to it. It was also argued that there was no ambiguity, because there was a devise to the testator's son Edward for life, and after his death to the testator's grandson Henry; but those are separate devises, and all that can be said is that the one follows the other. The case of *Doe d. Westlake v. Westlake* is distinguishable for the reasons given by my brother Bramwell.

Rule absolute.

*BRADBURY and Others v. MORGAN and Another, [*249
Executors of JOSEPH MANUEL LEIGH, deceased.
June 4.

Guarantee as follows :—"I request you will give credit in the usual way of your business to L., and in consideration of your doing so I hereby engage to guaranty the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100*l.* sterling."—Held, that the guarantee was not a bare authority, but a contract, and therefore the executor of the guarantor was liable for goods supplied after his death.

DECLARATION.—That heretofore, and in the lifetime of the said J. M. Leigh, the said J. M. Leigh contracted, guarantied, and agreed with the plaintiffs, in the guarantee hereinafter mentioned called Messrs. Bradbury, Greateorex and Co., in the words and figures following, that is to say:—

"8, George Yard, Lombard St.,
"London, May 3, 1858.

"Messrs. Bradbury, Greateorex and Co.

"Gentlemen,

"I request that you will give credit in the usual way of your business to Henry Jones Leigh, of Leather Lane, Holborn; and in consideration of your doing so, I hereby engage to guaranty the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of one hundred pounds sterling.

"Limit £100."

"I remain, &c.,

"J. M. LEIGH."

And the plaintiffs accordingly from time to time credited the said H. J. Leigh in the usual way of their business; and the running balance of the said H. J. Leigh's account with the plaintiffs afterwards, and after the death of the said J. M. Leigh, and before the plaintiffs had any notice or knowledge of such death, and before any such notice as in the said guarantee was and is made and provided had been given to the plaintiffs, amounted to a large sum, to wit 100*l.*, and was and is due and unpaid to the plaintiffs; and *all things have [*250 been done and happened, and all times have elapsed, necessary to entitle the plaintiffs to maintain this action.

Plea.—That the said running balance of the said H. J. Leigh's account was and is due to the plaintiffs for goods sold and delivered by them, and credits for the same given by them in the usual way of their business, to the said H. J. Leigh, and not otherwise; and that the said goods were sold and delivered, and the credits in respect thereof given, and the debts constituting the said balance of the said account were, and each of them was, contracted and incurred after the death of the said J. M. Leigh, and not in his lifetime.

Demurrer and joinder therein.

Beresford (with whom was *Hume Williams*), in support of the demurrer.—The defendants are liable, as executors, for goods supplied by the plaintiff after the death of the guarantor. In *Williams on Executors*, p. 1557, 5th ed., it is said:—"The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty*, that the right of action, on which the testator or intes-

tate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator." Also, at page 1558, it is said:—"And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act which is uncertain and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up a bond, &c. For wherever in those cases the testator himself is liable to an action, his executors shall be liable also." Again, at page 1559, it is said:—"It is clear, also, that in many cases a liability may accrue against the

● *251] executor or administrator, *after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator. So, where a man covenanted that A. should serve B. as an apprentice for seven years, and died; it was holden that if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming him. So if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract." In *Siboni v. Kirkman*, 1 M. & W. 418, 423,† Parke, B., said:—"Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required." That doctrine was acted on in *Wentworth v. Cock*, 10 A. & E. 42 (E. C. L. R. vol. 37), where the plaintiffs had agreed to supply the intestate with a quantity of slate-blocks monthly at a fixed price, and the intestate had engaged to receive any quantity not exceeding 200 tons per month; the agreement to be in force until the 1st of January, 1858; and it was held that the plaintiff might sue his administrator for refusing to receive slate sent after the death of the intestate, and before the first of January, 1858. Here the guarantee is to continue in force until determined by notice. There is the following passage in *Williams on Executors*, p. 1604, 5th ed., which is no doubt at variance with the position contended for:—"If a man enters into a continuing guarantee and dies, his executor, it seems, is not liable upon it for advances made after the testator's death, which operates as a revocation." That passage was first introduced in the 4th edition

*252] (p. 1506), and the authority cited in support of the position *is *Smith's Mercantile Law*, p. 451, 5th ed. There the position is stated in similar terms, and the authorities cited in support of it are *Potts v. Ward*, 1 Marsh 366; *Cooper v. Johnson*, 2 B. & Ald. 394; *Kinguel v. Knapman*, Cro. Eliz. 11, and *Joyner v. Vyner*, Sir T. Raym. 415. *Potts v. Ward* was not the case of a contract, but of a reference to arbitration; it merely decided that the authority of an arbitrator is determined by the death of either party before the award. *Cooper v. Johnson* is a decision to the same effect. *Kinguel v. Knapman* and *Joyner v. Vyner*, so far from supporting the position laid down, are authorities against it. *Kinguel v. Knapman* was an action of debt on the bond of the defendant for the performance of an award by a third person; and it was held no answer that such person died before the time mentioned in the award for payment of the sum awarded.

Joyner v. Vyner was an action of debt against the defendant, as heir on the bond of his father conditioned for payment to the plaintiff of a sum of money on a day named, if the obligor failed to prove before that day that a bill of exchange, for which he had credit in his accounts with the plaintiff, had been paid. The obligor died before the day appointed for payment of the money, but the heir was nevertheless held liable on the bond.

J. Brown, in support of the plea.—The position laid down in *Smith's Mercantile Law*, p. 451, 5th ed., is correct; and this guarantee was revoked by the death of the testator. No doubt, there are many contracts which cannot be performed by representatives, such as contracts with authors or scientific persons. This case, however, is distinguishable from others by the peculiar terms of the guarantee. It amounts to a mere request, and like every other request *is revocable by death. The guarantor in effect says, "I request you to go [*253 on supplying goods until I give you notice to the contrary." The notice must have reference to the future supply of goods, for it cannot determine the contract so as to exonerate the guarantor from liability in respect of goods previously supplied. The guarantee must therefore be read as a mere request or authority to go on supplying goods until that authority is revoked. It is purely personal, for the guarantor says until "I give you notice." [POLLOCK, C. B.—That means "until you receive notice."] Where a man, who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad; it was held that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received: *Blades v. Free*, 9 B. & C. 167 (E. L. C. R. vol. 17). *Littledale, J.*, there said:—"There was no continuing implied contract made by the deceased, but an authority to the woman with whom he cohabited to make contracts for him from time to time, and at his death that authority ceased." [POLLOCK, C. B.—That case turned on this, that the man having held out to the world that this woman was his wife, she had an implied authority to pledge his credit for necessities supplied to her and her family, but he having died the authority was at an end. There is a wide distinction between a mere authority and a contract.] Where a man, who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad: it was held that the wife was not liable for goods supplied to her after his death but before information of it had been *received, she [*254 having had originally full authority to contract, and having done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties: *Smout v. Ilbery*, 10 M. & W. 1.† [POLLOCK, C. B.—The "request" may be struck out of the guarantee. Suppose it began thus:—"In consideration of your giving credit in the usual way of your business to Henry Leigh, I hereby undertake to guarantee you the regular payment of

the running balance of his account with you, until I give you notice to the contrary," the legal effect would be the same.] In *Story on Agency*, sect. 488, it is said with reference to revocation of authority by death:—"The doctrine seems to be a natural deduction or presumption of the actual intention of the parties." No doubt, a notice would not determine the liability of the executors for goods already supplied, because there was a duty on the part of the testator to pay for them. The distinction between a vested duty and a mere collateral act is pointed out in *Joyner v. Vyner*, Sir T. Raym. 415. In *Mason v. Pritchard*, 12 East 227, the Court construed the guarantee as continuing until determined by notice. By the Scotch law, a guarantor may determine his liability by notice; but here the guarantor has expressly reserved that right, and his death operates as a notice. [POLLOCK, C. B.—The mere fact of insanity would not be a revocation of such a guarantee.] This case is to some extent new in its circumstances, and it is for the convenience of all parties that a continuing guarantee of this description should not operate beyond the life of the guarantor.

Beresford was not called upon to reply.

*255] *POLLOCK, C. B.—We are all of opinion that the plaintiff is entitled to judgment. No doubt, if this were merely an implied contract which arose from a request, it would be revoked by the death of either party. *Blades v. Free*, 9 B. & C. 167 (E. C. L. R. vol. 17), is an authority that a request is revoked, but a contract is not put an end to, by death. The language here used, "I request you will give credit," is a mere mode of civil expression, and the party using it never meant to request in that sense which Mr. *Brown* has suggested. Instead of saying "I will thank you to give credit;" or "you will oblige me by giving credit," he says "I request you will give credit." Whether his death was contemplated, I do not know. The probability is, that if it had been suggested the plaintiffs would have required some notice before the guarantee was determined; but this is a contract, and the question is whether it is put an end to by the death of the guarantor. There is no direct authority to that effect; and I think that all reason and authority, such as there is, are against that proposition, and that the plaintiffs are therefore entitled to judgment.

BRAMWELL, B.—I am of the same opinion. The general rule is thus stated in *Williams on Executors*, page 1559, 5th ed:—"The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it; for the executors or administrators of every person are implied in himself." The only exception is where the contract is in respect of the *personal* qualification of the testator or intestate, and that does not apply to the present case. If the guarantee had been in these terms:—"I request you to deliver to
*256] A. to-morrow morning goods of *the value of 50*l.*, and in consideration of your so doing I will pay you," and before the morning the guarantor died, but the goods were duly delivered; I can see no reason why the personal representative of the guarantor should not be liable; and whether a guarantor says, "deliver some goods on a given day," or "deliver a quantity of goods upon any day or days,"

can make no difference. Very likely a tradesman, who would not trust in the first instance without a guarantee, would not deliver any goods after the death of the guarantor, but, however that may be, the executor must give some timely notice in order to put an end to the contract. Mr. *Brown* relied on the words "I request you will give credit;" but they are of no importance; for this is not a case of authority given by the deceased.

With respect to the passage in *Williams on Executors*, p. 1604, it is certainly not supported by any authority. It is there said, if a man enters into a continuing guarantee and dies, his executor, *it seems*, is not liable for advances made after the testator's death, which operates as a revocation. Reference is made to *Smith's Mercantile Law*, p. 451, 5th ed., but not to the authorities there cited; and if those authorities be looked at, there is no pretence for saying that they justify the proposition laid down in that book. Therefore it seems to me that there is no authority to prevent us from deciding in favour of the plaintiff.

CHANNELL, B.—I am also of opinion that the plaintiff is entitled to judgment. Whether the parties contemplated that the contract should extend beyond the life of the guarantor, is not the question. I agree with the Lord Chief Baron that the question is whether this is a case of mere authority or a contract. I am of opinion that it is a contract, and if so, it is not revoked by the death of the guarantor. A mere authority is determined by death, *but in the case of a contract death does not in general operate as revocation, but only in [*257 exceptional cases, and this is not within them.

Judgment for the plaintiffs. (a)

(a) See *Oxford v. Davies*, 12 C. B., N. S. 748 (E. C. L. R. vol. 104).

JOHN STUBS and PETER STUBS v. ELIZABETH STUBS.

June 4.

A. obtained from the *Heralds' College* a grant of arms, to be borne by him and the descendants of his brother. His brother had two sons, the elder of whom was heir at law of A., and the younger his executor with another person. A. devised all his household goods and effects to his wife, and she took possession of the grant of arms.—Held, that the two nephews of A. had not such an exclusive interest in the grant of arms as to enable them to maintain an action of detinue for it against the wife of A.

Seemle, that even if the executors were entitled to the grant of arms, the Court could not amend the writ, under the 19th section of the *Common Law Procedure Act*, 1860, so as to give judgment for the one plaintiff who was executor, since the other executor ought to have been joined.

THE declaration stated that the defendant detained from the plaintiffs a certain deed of a grant or patent of arms belonging to the plaintiffs, to wit, a patent of arms, dated the 28th day of February, 1849, and granted by Garter Principal King of Arms and Norroy King of Arms of the north part of England from the the river Trent northwards, to one Joseph Stubs, deceased; and the plaintiff's claim of return of the said deed of the said grant or patent of arms, or its value.

Pleas.—First, that the defendant did not detain the said deed as

above alleged.—Secondly, that the said deed was not nor is the plaintiffs' as alleged.

The replications took issue on the pleas.

The case came on for trial before Martin, B., at the London Sittings after last Hilary Term, when by consent a verdict was taken for the plaintiffs, subject to the following case, the Court having power to draw such inferences of fact as a jury would have drawn:—

*258] *Joseph Stubs, of Warrington, in the county of Lancaster, having by his own industry and success in trade acquired a considerable fortune, and having been placed in the commission of the peace for that county, but having no right to bear arms independently of the grant of arms hereinafter mentioned, applied to the Herald's College for a grant of arms. Joseph Stubs had not at the time of this application any lineal descendants of his own, but there were lineal descendants then living of his deceased brother Thomas Stubs, namely, two sons, the plaintiffs in this action, and a daughter, who has since married and is now under coverture.

The following is a copy of the grant:—

To all and singular to whom these presents shall come, Sir Charles George Young, Knight, Garter Principal King of Arms and Edward Howard Howard Gibbon, Esquire, Norroy King of Arms of the north parts of England from the river Trent northwards, send greeting: Whereas Joseph Stubs, of Warrington, in the county of Palatine of Lancaster, Esquire, in the commission of the peace for the said county of Palatine, hath represented unto the most noble Henry Charles Duke of Norfolk, Earl Marshal and Hereditary Marshal of England, Knight of the most noble Order of the Garter, that he is desirous of bearing armorial ensigns with unquestionable authority; and therefore requested the favour of his Grace's warrant for our granting and assigning such arms and crest as may be proper to be borne by him and his descendants, and by the descendants of his brother Thomas Stubs, late of Warrington aforesaid, Gentleman, deceased, with due and proper differences, according to the Laws of Arms. And forasmuch as the said Earl Marshal did by warrant under his hand and seal, bearing date the 12th day of February instant, authorize and *259] direct us to grant and assign such arms and crest *accordingly: Now know ye therefore, that we the said Garter and Norroy, in pursuance of his Grace's warrant and by virtue of the letters patent of our several offices to each of us respectively granted, do by these presents grant and assign unto the said Joseph Stubs the arms following, that is to say, Or three piles, two issuant from the chief and one from the base azure, each charged with a pheon of the field; and for the crest, on a wreath of the colours issuant from flames, a dexter arm embowed in armour grasping a battle-axe all proper, pendant from the hand by a chain or an escocheon sable charged with a pheon, as in the arms as the same are in the margin hereof more plainly depicted, to be borne and used for ever hereafter by him the said Joseph Stubs and his descendants of his brother Thomas Stubs deceased, with due and proper differences according to the Law of Arms. In witness thereof we, the said Garter and Norroy Kings of Arms have to these presents subscribed our names and affixed the seals of our several offices this 28th day of February, in the 12th year

of the reign of our sovereign lady Victoria, &c., and in the year of our Lord 1849. CHARLES GEORGE YOUNG, Garter. E. H. HOWARD GIBBON, Norroy.

Extracted from the records of the College of Arms, London, and examined therewith this 16th day of December, 1861. ABERT W. WOODS, Lancaster Herald. G. E. ADAMS, Rouge Dragon.

The grant is made in the manner and form in which the Heralds' College (who are a body corporate by virtue of various charters from the Crown) have, on payment of certain fees, from time immemorial been accustomed to grant arms. The fees paid by Joseph Stubs for the grant amounted to 76*l.* 10*s.*, besides 3*l.* 3*s.* for charges of herald painters in connection therewith.

*Joseph Stubs died without issue, and by his will, dated 20th July, 1860, he appointed his nephew Peter Stubs, son of his late brother Thomas Stubs, and James Marson, trustees and executors of his will, and he bequeathed (so far as material to the present case) as follows:—"I give and bequeath absolutely unto my wife Elizabeth all the household goods, wine, plate, plated articles, linen, china, books, prints, pictures, carriages, horses, farming stock, and household effects, whether of use or ornament, and which shall belong to me or be in or about any dwelling-house or dwelling-houses occupied by me at the time of my decease." And he gave, devised, and bequeathed to his said trustees, their heirs, executors, and administrators, all the rest of the real and personal estate whatsoever and where-soever of which he might be seised or possessed at the time of his decease or over which he might have any power of disposition, upon trusts for sale and conversion. [*260]

The defendant, who is the testator's wife Elizabeth, mentioned in the above bequest, after the testator's death took possession of the grant of arms, which was in an iron safe in the testator's dwelling-house at Fordsham, which he occupied at the time of making his said will and until and at the time of his death, to which safe she had access with the knowledge and sanction of the testator's executors for the purpose of securing her own articles of value, and subsequently refused to deliver it up.

The executors and trustees of the will, one of whom is the plaintiff Peter Stubs, assented generally to the bequest to the defendant contained in the said will, and allowed the defendant to take possession of and sell the furniture and other articles in the said house; but, unless as a matter of law the said grant of arms is comprised in the said bequest and passes to the defendant by virtue thereof, the executors *are not to be taken to have assented in any way to the defendant's keeping possession of or having the same. [*261]

The plaintiffs are the only sons and male lineal descendants of the testator's brother Thomas Stubs mentioned in the grant, John Stubs being the elder and Peter Stubs the younger son of the said Thomas Stubs.

The questions for the opinion of the Court are:—

First: Whether the deed or grant of arms passed by or was comprehended in the above bequest to the defendant in the said will of her husband. If the Court should be of opinion that this question

ought to be answered in the affirmative, the present verdict is to be set aside and a verdict entered for the defendant.

Secondly: Whether, if the first question ought to be answered in the negative, the defendant is still entitled to retain the deed during her life. If the Court should be of opinion that this question ought to be answered in the affirmative, the present verdict is to be set aside and a verdict entered for the defendant.

Thirdly: If the first and second questions ought to be answered in the negative, then the present verdict is to stand as a verdict for both the plaintiffs, or for the plaintiff John Stubs, unless the Court shall be of opinion that the property in the grant passed to the trustees or executors under the will of the said Joseph Stubs, and in that case it is to be entered, and the deed given up as the Court shall direct.

Brett (Crompton Hutton with him), for the plaintiffs.—The grant of arms did not pass to the defendant under the will of her husband; neither is she entitled to retain it during her life. [POLLOCK, C. B.—She has a right to keep it in order to support her claim to bear her husband's arms.] *262] This is the grant of an honour which descends to the heir of the grantee. Lord Coke, in his Commentary on the rule in Littleton, sect. 31, that a gift of lands or tenements to another and to his heirs, male or female, confers a fee simple, says: (a)—“This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heirs male lineal or collateral. For albeit a female be heire at the common law, yet the shield, armories, and armes descend unto them that are able to beare them (farre exceeding the nature of gavelkind, but with several differences). And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they be by expressing the armories and armes belonging to that family, and the husbands of them may impale them or quarter them with their owne, as the case shall require.” Again, in his Commentary on Littleton, sect. 210, where it is said that the custom of gavelkind “standeth with some reason; for every son is as great a gentleman as the eldest son is,” Lord Coke says: (b)—“By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sons, every son being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet, jure primogenituræ, the eldest shall beare, as a badge of his birthright, his father's armes without any difference, for that, as Littleton saith (section 5), he is more worthy of blood.” In Com. Dig. tit. *Biens* (B.), in treating of goods and chattels which go to the heir, it is said:—“So, a coat-
*263] armour, pennons, tomb-stone, and monuments in a church in honour of the ancestor.” . . . “An ancient horn, where the tenure of the land is by cornage.” *Pusey v. Pusey*, 1 Vern. 273. The heir may maintain an action of trespass against a person who removes from a church ensigns of honour, as coat-armour: per Coke, C. J., in *May v. Gilbert*, 2 Bulst. 150. This grant of arms could not

(a) Co. Litt. 27 a.

(b) Co. Litt. 140 b.

pass to the defendant under any of the words of the will. It is neither "household goods" nor "household effects." Then, if it did not pass to the defendant, the plaintiff John Stubs, who is the elder son of the grantee's brother, is entitled in his own right, or if not, Peter Stubs is entitled as executor. Under the 19th section of the Common Law Procedure Act, 1860, the Court may give judgment in favour of either of the plaintiffs who is entitled to recover.

Grove (*Thrupp* with him), for the defendant.—The defendant is entitled to retain this deed during her life. It is not disputed that the right to the shield descends to the heir, but the right to bear arms is distinct from the right to the possession of this document. It is nothing more than an exemplification of a grant of arms recorded in the Heralds' College. It states that it was "extracted from the records of the College of Arms, London, and examined therewith." If the plaintiffs have any right to bear the arms they may at any time obtain a copy of this grant from the Heralds' College: *Hearne's Antiquaries' Discourses*, Chap. XLVI., XLVII. The visitation books of the Heralds' College are evidence, because they are originals: *Matthews v. Port*, Comber. 62; but this document, being a copy, would not be evidence: *King v. Foster*, Sir T. Jones 224. If the claim is founded on the right to bear the arms, it is clear that the *plaintiffs are not entitled to bear them without some difference: *Dugdale's Antient Usage of Arms*. But assuming that this document is in the nature of a title-deed, if the plaintiffs are entitled to recover it from the defendant, all the descendants of the grantee who had a right to bear the arms would have the same right to recover it. The defendant having possession of this document has a right to retain it, unless the plaintiffs can show a better right: *Yea v. Field*, 2 T. R. 708. As a general rule, where several persons are equally entitled to a deed, the one who has possession of it is entitled to retain it: *Dixon on Title Deeds*, vol. 1, c. 3.—(He was then stopped by the Court.)

POLLOCK, C. B.—My brother *Bramwell* and myself are of opinion that this grant of arms is a sort of family document in which every member of the family is interested; and that whoever has possession of it is entitled to keep it, but may be called upon by the others to produce it. It seems to me that *detinue* will not lie to recover it from any one interested in it. The defendant has a right to keep it for the purpose of justifying her use of the arms. It is not the sort of chattel which any one can specifically claim, as a peer would the patent of his peerage; it is a right to be enjoyed by all persons mentioned in the grant or connected with the grantee by relationship. If the grant had been to the husband alone, it is clear that the defendant would have had a right to the document as against the executors; and I think that now she has such a right. If the plaintiffs think it of sufficient importance to file a bill in Chancery to prevent the defendant from defacing or parting with it, they can do so; but that is a matter with which we have no concern.

**BRAMWELL, B.*—I am of the same opinion. It is clear that this action is not maintainable by the plaintiffs, or either of them, as executors, because one of the plaintiffs is not an executor; and if he is left out, there remains the other plaintiff who is an executor, yet not only the one; and the plaintiffs by declaring in this

way prevent the defendant from pleading in abatement the non-joinder of the other executor, which she would be entitled to do if the one plaintiff who is executor had sued alone. It could never have been the intention of the legislature, when they provided that one plaintiff might be struck out of a writ and judgment given for the other, that judgment should be given for one plaintiff who could not have maintained the action if he had in the first instance been the sole plaintiff.

That both the plaintiffs are entitled to recover cannot be contended for a moment. But then it is said that the eldest male representative is entitled to take possession of the document and bear these arms; but I shall content myself with saying that Mr. *Brett* has not satisfied me that is so. I therefore think that the plaintiffs have not in any view established their case, and that our judgment ought to be for the defendant.

Judgment for the defendant.

*266] *THE ATTORNEY-GENERAL v. ABDY. June 13.

A., an officer of Customs, subscribed to the "Customs' Annuity and Benevolent Fund" for the capital sum of 500*l*. This Fund, which was established by the 56 Geo. 3, c. lxxiii., is raised on the principle of life insurance by the quarterly subscriptions of the officers of Customs, a contribution of poundage deducted from their salaries, and the profits derived from the publication of the "Customs Bills of Entry." By the rules and regulations made under the authority of that Act, if an annuity be insured for the benefit of the widow of a subscriber, equal to one-third of the whole insurance, the subscriber is empowered to direct by his will or instrument in writing that the capital money insured shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or his nominee if duly admitted by the directors of the Fund. Where there is no widow or nominee, the whole capital money is subject to the directions of the subscriber. If the subscriber shall not have applied it, it becomes the property of his children. If no child, it is to be appropriated to increase the widow's annuity. If no widow or child, the capital money is to be paid to the personal representatives of the subscriber, to be by them applied according to the Statute of Distributions. A., who was never married, by his will gave the capital money to his sister.—Held, that she took a succession within the meaning of the 2d section of the Succession Duty Act, 1854, and that A. was the predecessor; and consequently she was chargeable with duty on the capital money.

INFORMATION in equity by the Attorney-General (so far as material) as follows:—

1. The object of this information is to obtain from the defendant payment of the succession duty which has become payable in respect of the succession of the defendant under the disposition made by her brother, George Burlton Abdy, deceased, in a sum of 498*l*. 13*s*. 1*d*., being the amount of the capital money forthcoming by virtue of his insurance in the Customs' Fund, and placed at his disposal by the rules and regulations of the said Fund.

2. In the year 1816 was passed an Act of Parliament (56 Geo. 3, c. lxxiii.), intituled "An Act for establishing and regulating a Fund for the widows, children, and relatives of officers or persons belonging to the Department of Customs in England," and by virtue of such Act, and immediately after its passing, directors and other officers, such as are mentioned in its provisions, were duly appointed, and a Fund, called "The Customs' Annuity and Benevolent Fund," was raised by means of quarterly contributions, and deductions from the salaries of officers and persons belonging to the Department of the Customs.

3. Rules, regulations, and tables of rates of subscription *and [*267 payment for the management and regulation of the said Fund have from time to time been made, approved of, ratified and confirmed, as directed by the said Act; by the second section whereof they become and are made of the same force and effect as if they had been particularly enumerated and enacted in the Act.

4. The Fund is raised by subscription, upon the principle of life insurance, and together with the contribution of poundage granted by the Act forms a fund for the widows, children, and relatives, and also the nominees of officers or persons belonging to the Department of Customs in England. Persons not relatives of subscribers may be admitted as their nominees, such admission taking place during the subscriber's lifetime, and being subject to be revoked by him at his will or annulled by the directors at their discretion when they have cause to believe that such admission has been procured in fraud of the principle and policy of the Fund. Nominees are entitled to such proportion only of the insurance as is directed by the subscriber in conformity with the regulations. The rates of annual subscriptions and payment are fixed by certain tables annexed to the rules. Insurances may be effected at the discretion of the directors on the life of any officer or clerk or other person employed in the Customs in England, and whose age is not less than sixteen years, for an annuity under Table A, (a) not exceeding 100*l.*, and for a capital sum under Table B, (b) not exceeding 2000*l.*, with power for any person to agree with the directors for paying up and liquidating his subscriptions in any limited number of years, the calculations for ascertaining the amount being made on the basis upon which the tables are constructed. The widow is the first object of the institution, and for her benefit an annuity may be expressly insured under Table A; *and if the [*268 annuity so insured bear a certain proportion to the capital sum insured (one-third, computing 10*l.* of annuity as equivalent to 100*l.* of capital money), then the subscriber may, by will or by an instrument in writing signed by him in the presence of a witness, and which, at the option of the subscriber, may be made absolutely irrevocable, direct the whole capital money to be applied in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or nominees. If an annuity or one of proper amount is not insured, then, after appropriating sufficient of the capital sum to make it good, the residue is to be applied as the subscriber shall in like manner direct. But in lieu of every 100*l.* so to be applied for the benefit of the widow the subscriber has the option of directing that the interest of not less than 200*l.* to be invested in Consols shall be paid to her, in which case, at her death the stock is to be at his disposal. In like manner, where the subscriber does not by will or other instrument direct the application of the money, it is to become the property of his children living at his death, in equal proportions, and the issue (*per stirpes*) then living of any that may be dead. If he leave no issue, then it is to be appropriated to increase the widow's annuity. If no widow or issue, then it is to belong to the persons entitled as next of kin according to the Statute of Distributions, and for the purpose of such application is to be paid to the subscriber's personal

(a) See p. 286.

(b) See p. 287.

representatives. Where any capital money becomes the property of any infant it is to be invested in the names of the trustees of the Fund, who are to pay the interest to a trustee for the infant's benefit, and may advance to such trustee out of the capital such sums as they may think fit for the infant's maintenance or education.

5. The late George Burlton Abdy was an officer of Customs, and, *269] as such, effected an insurance on his life for a *capital sum of 500*l.*, payable out of the said Fund, upon the terms and conditions contained in the said Act of Parliament and the rules and regulations made pursuant thereto. And on the 16th day of July, 1855, the said George Burlton Abdy (who had not then and never had any wife or children, and who had not previously in any way directed the application or payment of the said capital sum) made his will in writing, duly signed and attested, so far as it is necessary for the purposes of this suit to state the same, in terms as follows:—"I give all that policy of assurance effected on my life with the Reliance Insurance Company, in King William Street, for the sum of 500*l.*, and all that policy of assurance effected on my life in the Customs' Fund for the sum of 500*l.*, and all moneys to become payable under the same policies respectively, whether now secured or by way of bonus accretion or otherwise, unto my sister Charlotte Mary Abdy absolutely, and I appoint her sole executrix of this my will."

6. On the 14th of September, 1856, the said George Burlton Abdy executed a codicil to his said will, by which he gave to his sister Charlotte Mary Abdy absolutely all his furniture and household effects, &c., and appointed Henry Pickering Clark executor of his will and codicil.

7. The said George Burlton Abdy died after the time appointed for the commencement of the Succession Duty Act, 1853, without having revoked his will; and the will with the said codicil thereto was, on the 27th day of October, 1856, duly proved by the said Henry Pickering Clark alone in the Prerogative Court of the Archbishop of Canterbury; and upon the death of the said George Burlton Abdy, his sister, the said Charlotte Mary Abdy, became entitled to the capital money forthcoming by virtue of his insurance in the said Fund, as a succession derived from him under the disposition thereof made as *270] hereinbefore *stated, and a duty at the rate 3*l.* per cent. upon the value of succession became payable to her Majesty in respect thereof.

8. On the 18th day of December, 1856, the directors of the Customs' Annuity and Benevolent Fund paid to the said Charlotte Mary Abdy the whole of the capital money forthcoming by virtue of the insurance of the said George Burlton Abdy in the said Fund, amounting to the sum of 498*l.* 13*s.* 1*d.* sterling. But neither the said directors nor the said Charlotte Mary Abdy have or has ever paid any part of the duty payable in respect of the succession of the said Charlotte Mary Abdy in the said capital money, notwithstanding applications requiring them so to do.

Prayer (inter alia).—That it may be declared that the defendant is chargeable with duty, at the rate of 3*l.* per cent. in respect of her succession, on the said sum of 498*l.* 13*s.* 1*d.*; and that the defendant may be decreed to pay such duty.

The answer of the defendant (so far as material) was as follows:—

1. I admit that George Burlton Abdy, who had been for many years an officer of Customs in England, died on the 6th day of October, 1856, after having made such will and codicil as in the said information mentioned, and that the said will with the codicil thereto was, on the 27th day of October, 1856, proved by Henry Pickering Clark, the executor in the said codicil named, in the Prerogative Court of the Archbishop of Canterbury.

2. To the best of my belief the said George Burlton Abdy was on or about the 6th day of January, 1849, admitted as a subscriber to the Customs' Annuity and Benevolent Fund for the capital sum of 500*l*. No policy of assurance for the said sum was ever executed or given to the said George Burlton Abdy, but having made an *application upon a printed form, supplied by the secretary of the [*271 said Fund, he received a printed letter of acceptance, signed by the secretary and comptroller of the said Fund, and I have been informed and believe that his name was thereupon entered in the insurance book, kept at the office of the said Fund, as a subscriber for such capital sum as aforesaid. The said George Burlton Abdy paid the annual premiums in respect of the said sum down to the time of his death, when, as I was informed and believe, the capital money forthcoming by virtue of his insurance in the said Fund, after deducting the sum of 1*l*. 6*s*. 11*d*. for the premium and poundage then due thereon, amounted to 498*l*. 13*s*. 1*d*. sterling, and that sum was on the 18th day of December, 1856, under or by virtue of the rules and regulations then in force for the management of the said Fund, and the application of the capital moneys, forthcoming at the deaths of subscribers thereto, paid to me by order of the directors of the said Fund, without any deduction for succession duty or otherwise.

3. I admit that I have never paid any duty in respect of the said sum of 498*l*. 13*s*. 1*d*., because, as I am advised and submit, that under the provisions and regulations contained in the Act of Parliament (56 Geo. 3, c. lxxiii.), and the rules and regulations for the management of the said Fund, from time to time made and passed under the authority of the said Act, by virtue of which the payment aforesaid was made to me, no succession, according to the definition thereof contained in the Succession Duty Act, 1853, took place, and consequently no succession duty became payable.

4. The statements in the information respecting the said Act of Parliament (56 Geo. 3, c. lxxiii.) therein referred to, and the establishment and constitution of the Customs' Annuity and Benevolent Fund thereby authorized to be established, and the provisions for raising and maintaining the *said Fund, and the rules and regulations [*272 for the management thereof, and for the application and distribution of the capital moneys forthcoming from the same as alimentary provision for the widows and children of deceased officers of the Customs, or other claimants entitled thereto, are not, as I believe and submit, sufficiently or accurately set forth in the said information; and for greater certainty, I crave leave to refer to the said Act of Parliament, and to printed copies of the several rules and regulations and tables of rates of subscription and payment of the Customs' Annuity and Benevolent Fund, from time to time made and passed in

pursuance of the said Act, and also to the following statements, which I am informed and believe contain a more accurate description and explanation of the objects, constitution, and management of the said Fund than is contained in the said information.

5. In the year 1816 a project was set on foot, with the approval of the Board of Customs and the sanction of the Lords Commissioners of the Treasury, for the establishment of a Provident Institution or Benevolent Fund, by means of which the widows, children, and relatives of deceased officers and persons belonging to the department of Customs in England, who might not have been able out of their salaries or pay to make a sufficient or any provision for the future support of their families, might be relieved and preserved from absolute want.

6. The principal objects sought to be attained in the formation of the said institution were:—

First, to fix the annual payments or contributions to be made by the officers or other persons desirous of making a provision for their families by means of the fund, at such an amount as to bring them within the reach of all classes of officers and servants employed in the Department of Customs, whose salaries would generally be low during *273] the earlier periods of their services, and liable to considerable reduction on their final retirement or superannuation.

And secondly, to secure the absolute and entire benefit of the provision so to be made for the parties, for whose maintenance and support it was intended, free from all other claims or demands whatsoever.

7. In order to secure the first object, with a due regard to the security of the Fund, it was enacted, by the Act 56 Geo. 3, c. lxxiii., s. 4, above referred to, "that a contribution of poundage in aid of the general purposes of the Customs' Annuity and Benevolent Fund should be raised and collected in the port of London, and remitted from the outports, in the manner therein referred to, either by deduction or otherwise, out of the salaries payable to all the officers, clerks, or other persons of every rank, situation, or nomination whatsoever, who should not signify that they declined to make such contribution in manner directed by the said Act; and such contribution should be assessed for the first eight quarters, to be reckoned from the commencement thereof, or thenceforth from the first assessment of every officer, clerk, or other person, as aforesaid, appointed after the passing of the said Act to the said department of Customs, in respect of whom the said contribution of poundage is thereby declared to be and thereafter to continue to be compulsory, at the rate of twopence in every pound sterling, and in every fractional part of a pound sterling, and for every succeeding quarter the sum of one penny in every pound sterling, and in every fractional part of a pound sterling; but so that nothing in the said Act contained should authorize the taking any such contribution of poundage out of the day-pay allowance of any person employed in the Customs, or to the salary or sum awarded by way of compensation or superannuation to any officers, clerks, or *274] other persons who might have belonged to the said department; and the money which should be so collected as aforesaid should be paid over to such person or persons, or to such account, as should be specified in the rules and regulations thereinbefore

referred to in relation thereto. And thereafter, all such contribution to such Fund should be raised, collected, paid over, laid out, accounted for, and applied according to such rules and regulations." And by rule 4 of the rules and regulations aforesaid, it is provided and declared, that in order that the amount of insurance effected by subscribers may bear a proportion to the amount of contribution of poundage levied under the authority of the said Act upon their respective salaries, every subscriber shall be charged, over and above the amount of the subscription payable under the Tables A and B, a sum of 2s. 1d. annually upon every annuity of 10l., and also upon every capital sum of 100l. insured; but the contribution of poundage shall be allowed in reduction of such additional charge."

8. In order to secure the second of the objects above mentioned, it was enacted, by the 11th section of the said Act, that "in order to insure to the widows of the subscribers, or any other claimants on the said fund, the full benefit intended by the said Act as alimentary provision for the widows or other claimants entitled thereto, no annuity or sum of money payable to any widow or other claimant under any of the provisions of the said Act should be assignable, except with the permission of the said directors, or liable to be affected by arrestment, or otherwise attachable by any creditor, or be subject to the *jus mariti* of any husband with whom any such widow or other claimant might intermarry, or be subject in any manner to any debts, or deeds, or control of any such husband; but the same should be paid to each widow, or other claimant entitled thereto, upon her own receipt only, notwithstanding such arrestment, attachment, or marriage."

*9. In order to obtain further assistance to the fund without increasing the annual subscription of the members, and thereby [*275 to adapt it more completely to the circumstances of the persons for whose benefit it was chiefly intended, it was thought desirable to provide additional sources of profits, besides the general contribution of poundage authorized by the said Act, and the ordinary annual payments of subscribers.

10. With that view the attention of the directors of the said Fund (who were themselves officers in the various departments of the Customs, and whose services from the first establishment of the Fund have in all respects connected with its management, as also with the Bill of Entry Office hereinafter referred to, been entirely gratuitous), was soon after the passing of the said Act directed to two periodical publications, called "The Customs Bills of Entry," issued at the ports of London and Liverpool respectively, and containing various accounts relating to the imports and exports of merchandise into and from the said ports, which had for many years previously been published by or on behalf of the Clerk of the Bills of His Majesty's Customs, under the powers belonging to his office, and from the sale of which considerable profits were derived.

11. The office of clerk of the bills of His Majesty's Customs had been then for upwards of 100 years held under grants thereof made from time to time by successive letters patent under the Great Seal of Great Britain whereby the person for the time being holding the said office was authorized, under due control, to have access to the

books and documents kept by the officers of the Customs, and to extract therefrom the particulars of all imports, exports, and shipping into and out of the different ports of England and Wales, and to publish the same for the use and information of the public.

*12. The directors of the Customs Fund having, in the year *276] 1819, with the sanction of the Lords Commissioners of Her Majesty's Treasury, obtained a lease of the said office, to be granted to them by the patentee thereof, for the benefit of the said Fund, and having thereby obtained the management and control of the publication of the bills of entry, caused divers important improvements to be made in the said publications, and thereby so greatly enhanced their public utility, and consequently so increased the profits derived therefrom, that ever since that time a considerable annual income has been obtained by the means aforesaid, and applied in aid of the contributions of poundage authorized by the said Act of the 56 Geo. 3, c. lxxiii., for the benefit of the subscribers to the Customs' Annuity and Benevolent Fund.

13. In the year 1846, the then existing patent under which the said office was holden being about to expire, a memorial was presented to the Lords Commissioners of Her Majesty's Treasury by the then directors of the Customs' Annuity and Benevolent Fund and the patentee of the said office, praying that their lordships would be pleased to recommend the grant of a new patent to the directors of the said fund for the benefit of the subscribers thereto, upon the terms and subject to the conditions therein mentioned or referred to, and accordingly by letters patent under the Great Seal of Great Britain, bearing date the 1st day of August, 1846, the said office or place of Clerk of the Bills of the Customs of and for all goods and merchandise from time to time to be imported into and exported out of the United Kingdom of Great Britain and Ireland, with all the powers, privileges, and emoluments thereto belonging, was granted to the said directors and their successors, directors for the time being of the said Fund, from the 15th day of July, 1848, for the term and subject *277] to the conditions *therein mentioned, to the intent nevertheless that the said place or office, and all the sums of money, fees, allowances, wages, and rewards thereto belonging, or therewith received or enjoyed, should be held, received, and taken by the said directors and their successors in trust for the sole use and benefit of the Customs' Annuity and Benevolent Fund, and for no other use, trust, or purpose whatsoever.

14. Since the grant of the said last-mentioned letters patent, the directors of the Customs' Fund have, at great expense, and by means of the peculiar advantages possessed by them of superintending the publication of the said bills of entry, considerably increased their circulation; and they have also established similar publications at other parts of the United Kingdom of Great Britain, containing important information to all persons engaged in mercantile pursuits, whereby the profits derived from the said office have been greatly increased; and all such profits have from time to time, in pursuance of the provisions of the said letters patent, been carried to the credit of the Customs' Annuity and Benevolent Fund, and apportioned, with the other profits accruing to the said Fund among the subscribers thereto,

according to computations made of their respective claims on the Fund, by virtue of their assurances, in the manner directed by rule 15 of the rules, regulations, and table of rates of subscription and payment from time to time in force for the management of the said Fund.

15. I have been informed and believe, that the assistance obtained to the said Fund from the profits accruing in manner aforesaid from the publications aforesaid, has been the chief means of enabling the great bulk of the subscribers thereto to secure the benefits of the said Fund for their families and relatives, and that by means of such assistance the directors of the said Fund have been enabled so to reduce the number of annual payments required from *subscribers, as in the great majority of cases to free them from all further payments at the usual period or age of retirement or superannuation. By the rules in force from 1827 to 1854, the profits awarded to subscribers were applied in limitation of the estimated number of their prospective annual subscriptions, if payable for the whole term of life, or in reduction of the number of such annual subscriptions where the same were already limited, and in the event of such annual subscriptions becoming ultimately discharged, in an equivalent increase of the annuities or capital moneys insured; but, by rule 15, as altered in 1854, an option was conferred upon subscribers to have the profits awarded to them applied, first in an equivalent increase to their insurances, or secondly, in reduction of the amount of their annual subscriptions, or thirdly, in limitation of the estimated number of their prospective subscriptions, if payable for the whole term of life, or in reduction of the number of such subscriptions, where the same are already limited, and in the event of such subscriptions being ultimately discharged, in an equivalent increase of their insurances. [*278]

16. I have been informed and believe it to be the fact, that the profits derived to the Fund in each year from the contributions of poundage, and the publications of the Bill of Entry Office, together amount upon an average to upwards of one-third of the sums received for annual premiums or subscriptions from the members insured, and form nearly one fourth part of the total receipts from all sources accruing to the Fund in each year. It appears also from a report of the Customs Fund, published by order of the directors in the year 1856, that among the subscribers whose names were then standing on the books of the Fund, there was scarcely one member who had retired from the service at the usual period or age of superannuation, and who had applied his profits in reduction of the number of annual *payments, who was not then entirely free from any further payment of premiums during the remainder of his life; whilst it also appears, from the same report, that the additions from time to time made to the capital moneys forthcoming at the deaths of subscribers by virtue of their insurances in the said Fund, have been and are rendered, by the means aforesaid, far larger than the ordinary accumulations of the annual payments or premiums in respect of such insurances would allow of being made. [*279]

17. For the reasons and under the circumstances herein stated, I am advised and submit, that the said George Burlton Abdy had no property or interest whatever in the capital money forthcoming at his death by virtue of his insurance in the said Fund; that the said capital

money was not in any respect placed at his disposal by the rules and regulations of the said Fund as alleged by the said information; and that he had not even a limited power of appointment over the same under any disposition taking effect upon the death of any person dying after the time appointed for the commencement of the Succession Duty Act, 1853, by the exercise of which I can be deemed to have taken the said sum of 498*l.* 13*s.* 1*d.* as a succession derived from the said George Burlton Abdy, or from any other person creating the said alleged power as predecessor; and I submit that I am not liable to pay any succession duty in respect of the sum in the said information in that behalf mentioned.

The *Attorney-General*, the *Solicitor-General*, *Locke*, and *Hanson*, for the Crown.—The defendant is liable to pay succession duty. She became entitled to this money under the will of her brother, an officer of the Customs, who, by reason of his contribution to the “Customs’ Annuity and Benevolent Fund” acquired the right to dispose of it. The Fund *was established under the provisions of the 56 Geo. 3,
 *280] c. lxxiii. By section 1, (a) after reciting “that the establishment and regulation of a Fund for the conditional *benefit and
 *281] relief of the widows and children or other relatives of the established officers, clerks, or other persons employed in the department of the Customs in England would be highly beneficial,” certain officers of the Customs are required to meet and elect a committee for

(a) Enacts: “That all the established officers, clerks, and other persons permanently employed in the department of the Customs in the port of London, who shall have signed a notice in the form in the Schedule to this Act annexed marked A, signifying that they accede to the contribution of poundage authorized by this Act in aid of the general purposes of the Customs’ Annuity and Benevolent Fund, and shall have delivered such notice to the person to be appointed by the Commissioners of the Customs to receive the same, shall meet on some day and at some time and place to be appointed for that purpose by the Commissioners of the Customs, and which the said Commissioners of the Customs, or any four or more of them, are hereby required to appoint within fourteen days after the passing of this Act, and to cause seven days’ notice to be given of such day, time, and place, in such manner as they shall deem expedient and sufficient; and the senior officer in the department present at such meeting shall be the president and chairman of such meeting, and have the casting voice in case of equality of votes at such meeting; and the officers and persons present at such meeting shall elect and nominate twelve persons superintending in the said department, or being principals of offices and not being clerks, as a committee for the formation of the Customs’ Annuity and Benevolent Fund; which said committee shall elect and nominate a president or chairman, and shall forthwith proceed to consider and make and arrange such rules and regulations for the establishment and formation of a fund for the benefit of the widows and children or other relatives of the established officers, clerks, or other persons belonging to or employed in the department of the Customs in England, and the regulating the conduct and management of the said fund, and raising, collecting, and receiving the subscriptions and contributions of poundage necessary for forming such fund, and paying all annuities and claims thereout, and making tables of rates of subscription to and payments out of such fund for that purpose, and also the number and description of directors, trustees, auditors, secretary, or other officers necessary for managing and conducting the said fund, and the collection and safe custody of the moneys from time to time to be raised and subscribed, and the interest and growing produce arising therefrom, and paying all sums to be paid thereout according to such rules, regulations, and tables; and it shall be lawful for the said committee in such rules and regulations to specify the respective powers, authorities, and duties of such directors, trustees, auditors, secretary, or other officers respectively, and the mode of appointing a new director, trustee, auditor, secretary, or other officer to supply any vacancies or otherwise; and all questions which may arise at any such meeting of the said committee shall be decided by the majority of persons present at the meeting; and in case of equality of votes the president or chairman, or in case of his absence the officer or person appointed by him to be his deputy at such meeting of the committee, shall have the casting and second vote.”

the formation of the Fund. This committee is in fact the association ; and they are required to make rules and regulations for the establishment and formation of the Fund. By section 2,(a) as soon as the rules, regulations, and tables of rates of subscription and payment, have been made by the committee, and approved by the commissioners, and ratified by a Judge, they become of the same force and effect as if they had been enacted in that Act. By section 4,(b) provision is made for a contribution of poundage in aid of the general purposes of the Fund, which is to be deducted from the salaries of all officers, who shall not decline to make such *contribution. By section 9,(c) the directors may admit any person as nominee of a subscriber, although not a relative. By section 11,(d) no annuity payable to a widow or other claimant shall be assignable, except with the permission of the directors, or attachable by any creditor, or subject to the jus mariti of any husband whom a widow may marry. By section 16,(e) the directors are declared to have the exclusive control and management of the *Fund, and they may from time to time alter the rules, regulations, and tables of rates of subscription. By rule 1,(g) *the "Fund" is to be raised by subscription, on the principle of life insurance, and together with the contribu-

(a) Enacts: "That as soon as such rules, regulations, and tables of rates of subscription and payment, together with a statement of the number and description of officers necessary to manage the said fund, shall have been made by the said committee, and approved by the Commissioners of the Customs, or any four or more of them, and thereafter ratified and confirmed by some Judge of either of His Majesty's Courts of King's Bench or Common Pleas, or Baron of the Exchequer, such rules, regulations, and tables shall be taken and deemed to be, and shall be, to all intents and purposes, the rules, regulations, and tables of rates of subscription and payment of the said 'Customs' Annuity and Benevolent Fund,' and for the management and regulation thereof, and shall be of the same force and effect as if they had been particularly enumerated and enacted in this Act."

(b) This section is set out in the 7th paragraph of the defendant's answer.

(c) Enacts: "That the said directors shall and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber ; and the said nominee or nominees so admitted as aforesaid shall and are hereby declared to have, and thereafter to continue to have, to all intents and purposes, the same and the like interest in the said fund, and in the advantages thereof, as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

(d) This section is set out in the 8th paragraph of the defendant's answer.

(e) Enacts: "That the said directors shall and they are hereby declared to have the full, entire, and exclusive control and management of and over the said fund, and everything relating thereto, to all intents and purposes whatsoever, under and subject to such provisions, directions, regulations, and restrictions as may have been made in that behalf ; and it shall be lawful for such directors, if they shall at any time after any such rules, regulations, and tables of rates of subscription shall have been made think it necessary, from time to time to alter any such rules, regulations, and tables of rates of subscription, and to make any new and additional rules, regulations, and tables of rates of subscription which may appear to be essential or expedient for the better regulation, management, and control of the said fund : Provided always, that no such alterations of any rule, regulation, or table of rates of subscription already established, or new rule, regulation, or table of rates of subscription, shall be valid or effectual or enforced until the same shall have been approved by such subscribers to the said fund as may be qualified for that purpose, and in the manner set forth in the rules and regulations in force at the time, and by the Commissioners of the Customs, or any four or more of them, and ratified and confirmed by such Judge or Baron as aforesaid."

(g) The rules referred to in the course of the argument were as follows:—

"I. 'The Customs' Annuity and Benevolent Fund' shall be raised by subscription upon the principle of life insurance, and together with the contribution of poundage, granted by the aforesaid Act, shall form a fund for the widows, children, and relatives, and nominees of officers

*285] tion of *poundage is to form a Fund for the widows, children, and relatives, and nominees of officers of the Customs; and the admission by the directors of a nominee must take place during the life of a subscriber. By rule 12, the money insured may be applied

or persons belonging to the department of Customs in England; and the admission by the directors of a nominee or nominees of subscribers under the said Act, shall, as to the person of such nominee, or nominees, take place during the lifetime of such subscriber.

"II. The several tables of rates of subscriptions and payment marked respectively A, B, and C, hereunto annexed, shall be taken and deemed to be the tables of rates of subscription and payment for the use of the fund.

"III. Insurances may be effected at the discretion of the directors, on the life of any officer, clerk, or other person employed in the department of Customs in England, and whose age is not less than sixteen, nor more than sixty years, for an annuity under Table A, not exceeding one hundred pounds, and for a capital sum under Table B, not exceeding two thousand pounds; and should any person agree with the directors, that his subscriptions shall be paid up and liquidated in any limited number of years, the same may be done, the calculations for ascertaining the amount thereof being made on the basis upon which the tables are constructed.

"IV. In order that the amount of insurance effected by subscribers may bear a proportion to the amount of the contribution of poundage levied under the authority of the Act aforesaid upon their respective salaries:—Every subscriber shall be charged over and above the amount of the subscription payable under the Tables A and B, a sum of 2s. 1d. annually, upon every annuity of ten pounds, and also upon every capital sum of one hundred pounds insured; but the contribution of poundage shall be allowed in reduction of such additional charge.

"V. Every person desirous of becoming a subscriber shall make a declaration of his age, and if married, of the age of his wife, and of his state of health, and such other particulars relating thereto, and shall also agree to such terms or conditions of insurance as the directors may require; and if such declaration, or any part thereof, be false, or if such terms or conditions agreed upon be not fulfilled, the insurance and whole interest of such subscriber shall be forfeited.

"VI. Every person whose proposal to effect an insurance shall have been accepted, shall, where practicable, sign an order for the payment of his annual subscriptions by equal quarterly instalments out of his salary, in such form as the directors shall deem expedient. And such insurance shall, in all cases, take date from the first day of the quarter, in respect of which the first payment of subscription shall be made by him;—If the quarterly proportion of salary due to any subscriber shall not be sufficient to meet the sum payable on account of his subscription, or if there should be no salary due, or if the subscriber shall have ceased to belong to the Customs; he shall pay the amount, or the deficiency thereof, to the Receiver-General of the Customs in London, or to the Collector or Comptroller of the Customs at an out-port, within one calendar month after such subscription became due;—If any subscriber shall fail duly to pay his quarterly subscription, or in the event of any omission on the part of the Receiver-General, or Collector and Comptroller, shall not cause the same to be deducted from his salary, his insurance shall be forfeited."

"XI. The directors may, at the instance of the subscriber, exclude his widow from all benefit of the fund on account of misconduct on her part.

"XII. The appropriation of the capital money, forthcoming at a subscriber's death, by virtue of his insurance, shall be subject to the following regulations:—

"If an annuity be insured or forthcoming under Table A, for the benefit of the widow, equal to one-third of the whole insurance (computing 10l. of annuity as equivalent to 100l. of capital money);—Then the subscriber shall have the power to direct by any instrument in writing,†

† The following Forms of Instruments marked A, B, C: signed, witnessed, and deposited as required, will be sufficient and may be used respectively for the purposes of this rule.

Form A.—"In pursuance and in exercise of the powers vested in me by the rules of the Customs' Fund. I hereby direct that the capital money forthcoming by virtue of my insurance (or insurances) in the Fund, shall at my death, be paid and applied, according to the rules of the Fund, in manner following," viz.—
[Here state how the same is to be applied for the benefit of the parties described in the rule.]

Form B.—"In pursuance and in exercise of the powers vested in me by the rules of the Customs' Fund. I hereby direct that the capital money forthcoming by virtue of my insurance (or insurances) in the Fund, shall at my death, after due provision shall have been made therefrom by way of annuity to my widow, be paid and applied according to the rules of the Fund, in manner following," viz.—[Here state how the same is to be applied for the benefit of the parties described in the rule.]

Form C.—"In pursuance and in exercise of the powers vested in me by the rules of the Customs' Fund. I hereby direct that two-thirds (or the whole, or any portion between two thirds and the whole, as the subscriber may think fit) of the capital money forthcoming by virtue of my insurance (or insurances) in the Fund shall, at my death be invested in the purchase of Three per cent. Stock, and the interest thereof shall be applied for the benefit of my wife, during her life, if she should survive me—and at her death the stock so purchased, shall be paid as undermentioned, viz.—[Here state how the same is to be applied for the benefit

in any manner the subscriber may think proper for the benefit of his widow, children, or relatives, or of his nominee, who shall have been duly admitted by the directors. But if there is no widow or nominee (as in this case) the capital money is to be subject to the direction of the subscriber, either by an instrument in writing *signed in the presence of one or more witnesses and deposited with the directors, or by his will. And by the same rule, where a subscriber shall not have applied the capital money, it shall become the property of his child or children in equal proportions. If no child, the money is to be appropriated to the use of the widow, by allowing her an

signed in the presence of one or more witness or witnesses, and deposited with the directors, or by his will: That the whole capital money insured or forthcoming shall be applied in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, (†) or of his nominee, who shall have been duly admitted by the directors as aforesaid.—See Form A.

"But, if no annuity be insured under Table A: or if the annuity insured or forthcoming shall not amount to one-third of the whole insurance, computed as aforesaid,—Then so much of the capital money shall be set apart for the widow as shall give her one-third of the whole, so computed. And the capital money so set apart for the widow, shall be appropriated to the creation of an annuity for her life, according to the rates of Table C, hereunto annexed;—And the remainder of such capital money shall be subject to the direction of the subscriber as aforesaid.—See Form B.

"Provided, nevertheless, that in lieu of every such 100*l.* of capital money so to be applied for the widow, the subscriber shall have the option to direct that the interest of not less than 200*l.* capital money shall be allowed to his widow during her life. And in that case the sum so set apart for the benefit of the widow, shall be invested in the purchase of Three per Cent. Stock, in the names of the trustees of the fund, and the amount of stock so purchased shall be held by them as subject to the directions of the subscriber as aforesaid, to take effect at the death of the widow.—And the remaining capital money, if any, shall be subject to the direction of the subscriber as aforesaid, to take effect at his death.—See Form C.

"If there be no widow or nominee, or if the widow be excluded from all benefit in the fund, on account of misconduct, as hereinbefore mentioned.—The whole capital money forthcoming shall be subject to the directions of the subscriber as aforesaid.

"Where a subscriber shall not have applied the capital money herein placed at his direction (See Note D), the same shall become the property of his child, or children in equal proportions.

"And in the event of his leaving no child—Then the same shall be appropriated to the use of his widow by allowing her an equivalent annuity under Table C, in addition to the annuity before apportioned to her.

"If there shall be no widow nor any child—The whole capital money shall be paid to the person or persons legally appointed to administer to the estate and effects of the deceased, to be by him, her, or them applied according to the Statute of Distributions, in the same manner as any other money would be applied by law.

"If an annuity to any widow shall have been insured under Table A, and the directors shall have seen cause to allow of a different disposition of such annuity on the ground of misconduct as aforesaid, it shall be competent to the directors to convert such insurance of an annuity into an equivalent insurance of a capital sum, according to the then value of such annuity."

Table A showed the annual subscriptions payable by equal quarterly instalments, during the joint continuance of the lives of a husband and his wife, for an insurance of an annuity of 10*l.* payable after his death to his wife during the remainder of her life.

Table B showed the annual subscriptions payable by equal quarterly instalments, during life, for the insurance of a capital sum of 100*l.*, on the lives of male persons.

Table C showed the annuity payable by equal quarterly instalments, during life, in lieu of a capital sum of 100*l.*

of the parties described in the rule.]—I also hereby further direct that the proportion of the said capital money not applied as above-mentioned—shall at my death be paid according to the rules of the Fund as follows: viz.—[Here state how the same is to be applied for the benefit of the parties described in the rule.]

Note D.—If the subscriber should apply his insurance by will, it is necessary he should make specific mention of his insurance in the *Customs' Fund*; otherwise he will be deemed to have died without having given directions as to that insurance, for it will not pass under any general terms. In fact the insurer himself has no actual property whatever in the sum insured: he has only the power to appoint the same for the benefit of the parties described in the rules.

(†) These must be relatives by blood.

annuity. If no widow nor child, the money is to be paid to the personal representatives of the deceased subscriber, and applied by them according to the Statute of Distributions. Under these circumstances, although there is no formal policy, the transaction is in effect an insurance. In the *case of *Re Rowsell*,^(a) this Court decided *287] that a capital sum in this Fund, which a subscriber had bequeathed to his brother, was not subject to legacy duty, because it was not personal estate of the subscriber which he could dispose of as he thought fit; but that he had purchased a mere power to appoint a sum of money amongst a certain specified class. That decision, however, proceeded upon the definition of a legacy in the 36 Geo. 3, c. 52, s. 7. But the circumstance that this money is not subject to legacy duty does not prevent it being subject to succession duty. By the 2d section of the Succession Duty Act, 16 & 17 Vict. c. 51, "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, &c., upon the death of any person dying after the commencement of this Act, &c., shall be deemed to confer on the person entitled by reason of such disposition a succession." Here there was a disposition of property, by reason whereof the defendant became beneficially entitled to this money on the death of her brother who died after the commencement of the Act. By the Interpretation Clause, sect. 1, the term "personal property" shall include money payable under any engagement. This is money payable under an engagement. [MARTIN, B.—The section also says, "and all other property not comprised in the preceding definition of real property."] This is in substance an arrangement *288] between the directors of the Fund and a *Customs officer, whereby he became the purchaser of the sum insured, and the defendant, who takes it under his will, which is an execution of a power, takes it not only through, but *from* her brother, and the relation of successor and predecessor exists between them. It is true that the money is to be paid by the directors of the Fund, but, in considering the question of successor and predecessor, regard must be had, not to the hand by which the money is paid, but to the person through whom, upon his death, the benefit is derived: *Re Jenkinson*, 24 Beav. 64, *The Attorney-General v. Yelverton*, 7 H. & N. 306.† The directors of the "Fund" act ministerially and without an intention to benefit any particular person or class of persons, but the benefit is derived from the deceased officer who purchased the right to dispose of the money. The 17th section of the Succession Duty Act says that no policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurer and the insured; "but any disposition of the moneys payable under such policy, if otherwise such as in itself to create a succession, shall be deemed to confer a succession." Therefore, so far as that section has any bearing, the latter part supports the view contended for. The Act does not require that at the time the succession takes place, the disponent should have any interest in the property; all that is necessary is that there should be a disposition of the property by reason whereof some person becomes beneficially entitled to it on the death of a person dying after the commencement of the Act. It will, per-

(a) Not reported. See Tilsley's Stamp Law, p. 684, 2d ed.

haps, be argued that as the insurance was effected under certain rules and regulations deriving their authority from the 56 Geo. 3, c. lxxiii., the interest in the capital money was created by that Act, and did not result from any disposition of the property by a person who was a predecessor. But the fallacy is in not *distinguishing between [289 the machinery of the Act and the rules which regulate the actions of the directors, and the contract under which the money became payable. Neither the Act nor the rules made the money payable; but it became payable because a Customs officer effected an insurance upon the terms on which the Act and rules enabled the directors to contract with him. It was a voluntary act on his part: he proposed to effect an insurance; that proposal was accepted, and a contract was entered into with the directors. The consideration proceeded from the subscriber, who undertook to make certain payments according to the rules; and by those payments, he bought the right to have a sum of money paid by the directors out of this Fund upon his death. It is immaterial whether the money is payable to his personal representatives or his relations or nominees: he has a right to direct its payment to any of the class mentioned in the rules, and, if he makes no direction, it is payable to his next of kin. This only differs from an ordinary insurance in this respect, that the directors will not contract except upon the terms that the insurer shall appoint the sum to which he is entitled among the class mentioned in the rules. It is the same as if a person insured his life and assigned the sum assured in trust for such of his relations as he should in his lifetime appoint, and in default of appointment, for his next of kin. It makes no difference that a poundage on the salaries of the Customs officers, and the profits of the publication called "The Customs Bills of Entry," are applied in aid of the Fund. There are many insurance companies in which the persons insured participate in the profits. In the case of *Re Jenkinson*, 24 Beav. 64, the disponent purchased for himself a reversionary interest, and assigned it, and it was held that did not prevent the case coming within the second section of the Succession Duty Act.

**Amphlett, Welsby, and Dean*, for the defendant.—No succession duty is payable. The appointment does not create a dis- [290 position, because it is only a limited power, and therefore the defendant takes the money not under the power, but from the donor of it. The 4th section of the Succession Duty Act removes all doubt in that respect. But then it is said that the case must be considered as if the subscriber had no such power, but had insured his life for the benefit of his sister. But if a person effected an insurance for the benefit of a child, reserving to himself no power of appointment, that would not create a succession within the meaning of the Act. In the case of *Re Jenkinson*, 24 Beav. 64, the testator made, for his own benefit, a contract under which a sum of money was payable to himself, and he settled that money on his children; in which case there is no reason why succession duty should not be payable. But where a person enters into a contract for the benefit of his children, the money payable under the contract never belonged to him, and it is difficult to see how there can be a succession from him as predecessor. Suppose a father gave money to his son for the purpose of insuring the father's

life, it is clear that no duty would be payable, and the result is the same whether the father himself purchases the insurance for his son, or gives him the money to purchase it. The Court will not look beyond the settlement to inquire from whom the consideration may have moved. Suppose a father said to his brother, "If you will settle your estate on my children, I will give you a sum of money," and the settlement was accordingly made, he would be the predecessor, and the Court would not inquire into the consideration which induced him to make the settlement. The contribution to the fund is not a voluntary but a compulsory payment. The 56 Geo. 3, c. lxxiii., and the rules and regulations under it, create a legislative provision for *291] the families of Customs officers, with this condition attached to it, that no family shall be entitled to any benefit from it unless the officer has contributed to the increase of that fund. When that condition is complied with, the family acquire a parliamentary title to a share of the fund. There is no contract between the officer and the directors which could be enforced in a Court of law by the executors of the officer; but if he makes the proper contribution, the directors become trustees for his widow, relatives, or nominees, who may in a Court of equity enforce payment by proceedings in their own name. Then how can it be said that the testator was the creator of this interest? The legislature created the fund; the testator merely complied with a condition which enabled his sister to participate in it. The Attorney-General *v. Rowsell* shows that the testator had (if any) only a limited power of appointment over the Fund. The object of the legislature was to make provision for the families of Customs officers, and care has been taken to prevent it becoming an insurance for the benefit of the officers. That is evident from the preamble (a) and the 4th, (b) 9th, (c) and 11th (d) sections of the 56 Geo. 3, c. lxxiii. The rules have been framed with the same object. The first rule (e) recognises the necessity of a nominee being approved of by the directors. By rule 12, (g) the widow of a subscriber is entitled to one third of the capital money insured, and no appointment can be made by him to deprive her of it. Again, if the subscriber has not applied the capital money, and has no widow or child, it is to be paid to his personal representatives, not as part of his estate, but to be by them applied according to the Statute of Distributions. (h) As observed by *292] the Lord Chief Baron in the case of *Re Rowsell*, this is "a subscription to a fund for particular purposes, over which the subscribers have, in some instances, no control, and even where they have, it is only a limited control." The relatives or nominees of a deceased officer acquire the right to participate in the Fund by virtue of the Act of Parliament, not by any contract between the officer and the directors. It is only a condition attached to their participation that some additional contribution shall have been paid by the officers.

(a) *Antè*, p. 280.(b) *Antè*, p. 273.(c) *Antè*, p. 282.(d) *Antè*, p. 274.(e) *Antè*, p. 283.(g) *Antè*, p. 284.

(h) They also referred to the new rules made in 1854, amongst which was the following:—
 "If there shall be no widow nor any child, or other issue as aforesaid of such subscriber, the whole capital money shall belong to the person or persons entitled as his next of kin, according to the Statute of Distributions, and shall be paid to the legal personal representatives of such subscriber, whose receipt shall effectually discharge the directors of the said Fund from seeing the application of such capital money."

Moreover, letters patent have been granted to the directors enabling them to publish the "Customs Bills of Entry" in aid of the Fund, whereby it has been greatly increased. The question must depend upon the 2d section of the Succession Duty Act, because no relation of successor and predecessor could be created between the defendant and her brother by his exercise of the limited power of appointment. In *re Barker*, 7 H. & N. 109.† Then to bring the case within that section, the Crown must establish three propositions; first, that the interest in this Fund is "property" within the meaning of the 2d section; secondly, that there has been a "*disposition*" of property within the meaning of that section; and thirdly, that there is a successor and a predecessor. It is conceded that this is money payable under an engagement, and therefore within the definition of "property" in the interpretation clause; but there must be a disposition of that property apart from the engagement itself. The second section should be thus read: "every past and future disposition of money payable under any engagement;" that is, a disposition of money engaged to be paid. Here there is no such disposition, for the subscriber never purchased the interest in the Fund for *his own benefit. [*293] Moreover, there must be not only a "*disposition*" of property, but also a predecessor. If no predecessor, however clear the succession, no duty is payable. In the case of a pension granted by Parliament to widows and children of military officers, there is a succession, but no predecessor, for Parliament is not a "person" within the meaning of the interpretation clause, and the deceased officer would clearly not be a predecessor. The only difference in this case is that, the Customs officer is compelled to contribute to the fund, but that does not make him a predecessor. By section 2, "the term '*predecessor*' shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived." A predecessor is not the person *through* whom, but *from* whom, the interest of the successor is derived. The interest of the defendant is not derived from the testator, for he never had any interest in the property, but only a limited power of appointment, created, not by himself, but by the Act of Parliament, and the rules and regulations made under it. The succession is derived from a disposition made by virtue of the Act and the rules and regulations, and if that disposition had been made by a corporate body or an individual, he would have been the predecessor. But for the 17th section, the question would have arisen whether, under the 2d section, the relation of predecessor and successor did not exist between the directors and the defendant, but the 17th section has removed all doubt in that respect. [MARTIN, B.—That section was meant to apply to ordinary policies of insurance, where money is payable by one person on the death of another.] In *The Attorney-General v. Yelverton*, the consideration-money was paid to the father, and by a separate instrument he settled it on his children; if the whole transaction had been effected by one instrument, the relation of predecessor and successor *would not have been created. The case of *Re Jenkinson* is the same in principle [*294] as *The Attorney-General v. Yelverton*.

Locke replied.

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POLLOCK, C. B.—All the members of the Court now present^(a) are of opinion that our judgment ought to be for the Crown, as appears to me upon grounds that are tolerably clear; and I am not aware that my brother Channell differs in opinion. This is in effect an insurance on the life of an officer of Customs. He paid an annual premium according to the scale in the Rules, by which he became entitled to direct that a sum of 500*l.* should be applied for the benefit of his relatives, or nominees if approved by the directors; and by his will he gave it to his sister, the now defendant. The question is whether that is a disposition of property, by reason whereof a person has become beneficially entitled to property upon the death of another person, so as to confer a succession within the meaning of the Succession Duty Act; there being no doubt that there must be a predecessor.

It seems to me that this case does not differ, except in some points already adverted to, from an ordinary insurance. When a man insures his life and by his will disposes of the sum insured, no doubt can exist, for the 17th section of the Succession Duty Act expressly says, "that any disposition or devolution of the moneys payable under such policy, if otherwise such as in itself to create a succession, shall be deemed to confer a succession." That is an enactment, which brings a disposition or devolution of moneys payable under an ordinary policy of insurance within the provisions of the Succession Duty Act; and in what does this case differ?

*295] *Two points were made: first, that the Fund is not entirely supplied by the parties who insure; and, secondly, that they have only a limited interest in it. I think that neither of the points raises any objection to the application of this statute. No doubt the Fund is not created by the subscriptions alone, but the legislature seems to have taken pains to indicate that it is the contribution of the officers which forms the nucleus or basis of the Fund;—not indeed sufficient to bear the burthen of the whole, but every officer of the Customs must subscribe whether he avails himself of it or not. The provision of this Fund is not separate and apart from the establishment to which the parties belong; and pains are taken to show that in reality it is stopped out of their pay. No doubt they cannot prevent it, but it is, and the legislature declares it to be, for the purpose of creating this Fund. Then the Fund arises from the actual contribution of the officers of the Customs paying for an insurance in the same way as on an insurance with a company.

Then it is said that the subscriber has only a limited power over the sum assured. But if he has only power to leave it to a certain class of persons, and does leave it to one of them, that person is a successor within the meaning of the 2d section of the Succession Duty Act, because there is a disposition of property whereby he becomes beneficially entitled to property upon the death of another person. The officer, by payment of the premiums, created the power under which he acted, and therefore he is the predecessor. Suppose the father of a family insured his life, and the policy contained a clause that he should only leave the sum assured amongst his children, would that make any difference? I do not see why the want of an

(a) Pollock, C. B., Martin, B., and Bramwell, B.—Channell, B., had left the Court.

unlimited power over the Fund should prevent there being a succession. There are many powers of appointment which are limited to a certain class of persons, and if exercised *in favour of a person who is a member of the class, that would create a succession. If a man had power to appoint a certain sum amongst all his sons, or all his daughters, or all his next of kin, and he exercised the power, would not that confer a succession within the 4th section of the Succession Duty Act? The person who created the power would be the predecessor, and the person benefited by the exercise of it would be the successor. [*296]

For these reasons I am of opinion that the Crown is entitled to judgment.

MARTIN, B.—I am of the same opinion. I think that the Succession Duty Act ought to be construed according to the rule laid down by Lord Campbell in the case of *Lord Braybrooke v. The Attorney-General*, 9 H. L. 150, 165. Lord Campbell there said, "that this statute, which by the same enactments imposes a tax on successions in every part of the United Kingdom, is to be construed, not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed; so that all such property may be subject to the succession duty, according to the general intention which the legislature has expressed." In *The Attorney-General v. Yelverton*, 7 H. & N. 306,† there was a difference of opinion in this Court, and therefore it became necessary to consider our judgments; and my brother Bramwell concurred in thinking that the proper mode of construing the Act was that enunciated by Lord Campbell.

Then what are the facts of this case?—and I wish to be understood as giving my judgment simply upon these facts—Mr. Abdy, an officer of the Customs, effected an assurance on his life for a capital sum of 500*l.*, payable out of the "Customs' Annuity and Benevolent Fund," on the terms and conditions contained in the 56 Geo. 3, c. lxxiii., and *subject to certain rules and regulations made in pursuance of that Act. I apprehend I am bound to act, and I do act, on the judgment of this Court, in the year 1844, in the case of *Re Rowsell*, which put a construction upon policies effected under the 56 Geo. 3, c. lxxiii., which creates a particular species of property, limited as to the persons who are to enjoy it, but over which the person who purchased it had, to a certain extent, a control. The subscription of Mr. Abdy to the fund entitled him, not to any personal benefit during his life, but only to dispose of the sum assured amongst his relatives or nominees on his death; and by his will he gave "all that policy of assurance effected on his life in the Customs Fund for the sum of 500*l.* and all moneys to become payable under the same, unto his sister," the now defendant, absolutely. Therefore what was done by him in his lifetime created a species of property, which by his will he disposed of so that the defendant is legally entitled to it. I agree that, in construing the Succession Duty Act, we ought clearly to see that the duty is imposed, and if the words of the Act do not apply to this case, our judgment ought to be for the defendant. It seems to me, however, that it falls directly within the terms of the Act. The first section defines the meaning of "real property;" it then declares

that "personal property" shall include "money payable under any engagement." It is said that unless there was some contract by the directors to pay this money, it was not money payable under an engagement; but the section goes on to say, "all other property not comprised in the preceding definition of real property." Looking at the general language of the Act, it cannot be contended that this money is not "property." Then the 2d section of the Succession Duty Act enacts that every disposition of property, by reason whereof any person shall become beneficially entitled to any property upon *298] the death of any person, shall be deemed *to confer, on the person entitled by reason of such disposition, a succession. Now, if a property was created, how can it be contended that there was not a disposition of that property by Mr. Abdy's will, whereby the defendant became beneficially entitled to that property on his death? If so, the case falls within the first branch of the second section, for the defendant, by reason of the disposition of this property by her brother, became entitled to it on his death, and therefore there is a succession.

I agree, that there must not only be a succession but also the relation of predecessor and successor; and unless that exists duty is not payable. Giving to the second section the construction which I am bound to give it after the judgment of the House of Lords in the case of *Lord Braybrooke v. The Attorney-General*, I think that Mr. Abdy was the disponent of this property within the meaning of it. The 2d section goes on to say, "and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent and testator, &c., or other person, from whom the interest of the successor is or shall be derived." Even giving the section the construction contended for, viz., that the interest of the successor must be derived from a predecessor, I think this case is within it; because there is the act of Mr. Abdy by which he gave this property to the defendant, being one of the persons whom he was authorized to select by the Act of Parliament and the rules, and he thereby became the disponent of that property, and an interest in it passed to the defendant.

Then it was said that our attention should be directed to the 4th section; and if I thought there was anything in that section which embraced this case, I should be inclined to give judgment for the defendant. But I think that the 4th section has reference to a different class of cases. The first part of that section relates to a person *299] *who has a general power of appointment, and it declares that when that person exercises the power, the appointee shall be deemed to derive his succession from the donor of the power. The latter part of the section has reference to a limited power of appointment, and thereby creates a succession as between the person creating the power and the person who gets the benefit of the property. Looking at the language of the 4th section I am disposed to think that it was intended to apply to powers of appointment in a settlement of real property, but I do not say it may not apply to personal property.

The 17th section seems to me to confirm my view. It enacts that no policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured

That was introduced for the purpose of preventing any question whether succession duty was payable on the death of a person whose life was insured, and the latter part of the section says "that any disposition or devolution of the money payable under the policy, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." Therefore, in my judgment, this being a disposition of money payable under the insurance effected by Mr. Abdy, so far as the 17th section affords any analogy, if this is a disposition which in itself would create a succession, it must be deemed to confer a succession. That is the view taken in *Trevor on Succession Duty*, and which seems to me the correct one. For these reasons, giving the construction to the Act which I think we are bound to give, it seems to me that the case falls within the second section.

BRAMWELL, B.—I am of the same opinion. Mr. Abdy entered into an engagement with the directors of the "Customs' Annuity and Benevolent Fund," whereby, on certain payments being made by him during his life, he acquired a *right to appoint a sum of money [*300 on his death, either for the benefit of his widow, if he had one, or if not, of his relatives, or nominees if accepted by the directors. In my opinion, that right was "property," and by his will he disposed of that property to his sister, the defendant, so that there was a disposition of property whereby she became beneficially entitled to it upon his death, and consequently there was a succession.

It is said that cannot be so, for several reasons, one of which is that, under the Succession Duty Act, there must be both a successor and a predecessor, and Mr. Abdy is not a predecessor. Undoubtedly, this "Fund" cannot in any sense be said to be a predecessor, but I think Mr. Abdy is; and I confess I have difficulty in seeing why he should not be. Suppose the engagement had been in these words: "If you will pay us an annual premium during your life, you shall have a certain sum to leave by your will to your relatives or nominees on your death." Why in that case should he not be the predecessor? The difficulty is raised by reference to the 4th section, which says "that where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property and interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor." That, it is said, supposes three persons, one who takes the benefit, another who executes the power, and a third who *creates the power. That is true, but the two latter may [*301 be one, for the person who creates the power may be also the person who executes it; and the 12th section contemplates that a person may be both predecessor and successor, under a disposition made by himself.

Then it is said that Mr. Abdy did not create the power, because it exists by virtue of the Act of Parliament, and the rules and regulations of the Society. But I cannot assent to that proposition, because it seems to me that the power is created by the engagement entered into between the assurer and the directors, and that the Act of Parliament only enables them to enter into that engagement, and affords them facilities for carrying their purpose into execution. The validity and efficiency of the engagement is attributable to the act of the parties, and not to the Act of Parliament, except so far as I have mentioned. Then here there is property, that is, money payable under an engagement, over which the settlor had indeed but a limited power of appointment, but that power was derived from himself, so that there was an appropriate predecessor, viz., himself, and he made a disposition of it, to take effect upon his death, for the benefit of his sister, the present defendant.

The only other observation I have to make is with reference to the case of *The Attorney-General v. Yelverton*. If the opinion of the majority of the Court in that case was right (and I frankly own that my reason is not convinced), it seems to me to conclude this case; that is, upon the supposition that there was a disposition and a predecessor. But I wish to go further, and decide this case on my own opinion, because it seems to me that the effect of what Mr. Abdy has done has doubly made this duty payable on his death. For instance, suppose in the case of *The Attorney-General v. Yelverton* that the money, instead of being payable on Mr. Cowell's death, had been payable in his lifetime, and that by his will he directed that it should be paid to *the persons to whom he appointed it, that would

*302] have been a disposition of property which conferred a succession on his death. If the disposition in that case had been by will, a succession would have been created, but my difficulty there was that the instrument was not one which created a succession, but only transferred an interest. Here the succession is created by will, an instrument which gives a benefit upon death. Retaining, therefore, the opinion which I expressed in *The Attorney-General v. Yelverton*, it seems to me that the reasons which there influenced me do not apply, and that the Crown is entitled to judgment.

Decree accordingly.

EVANS and Others v. ROBINS. June 10.

The defendant put up for sale by public auction certain property described in the particulars as follows:—"Four freehold ground-rents of 19*l.* 4*s.* each, viz., 15*l.* ground-rent and 4*l.* 4*s.* garden-rent, amounting to 76*l.* 16*s.* a year arising from four capital residences of the annual value of 384*l.*, held by four leases granted to W. Reynolds for a term of ninety-five years each (wanting ten days) from the 29th of September, 1844, with reversion to the property in about eighty years." The plaintiff became the purchaser and paid the defendant 282*l.* as a deposit in part payment of the purchase-money. The vendors in making out their title produced four counterparts of leases granted by one Roy to Reynolds. By each of these leases, Roy, in consideration of the yearly rents thereafter reserved, demised to Reynolds a piece of land with a messuage thereon for the term of ninety-five years (wanting ten days) at the yearly rent of 15*l.*; and for the considerations aforesaid, and also in consideration of the further rent thereafter reserved and of the covenants of Reynolds, Roy covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the said term, to enter upon and use and enjoy as a pleasure-ground or garden a piece of land

particularly described, jointly with Roy; and Roy covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay Roy the yearly rent of 15*l.*, and also the further yearly rent of 4*l.* 4*s.* in respect of the right of user of the garden or pleasure-ground, such rent to be payable in the same manner as the rent of 15*l.* By the 10th condition it was provided, that if any mistake be made in the description of the property, or any error or misstatement whatsoever shall appear in the particulars, such mistake, error, or misstatement shall not vitiate or annul the sale, but a compensation or equivalent shall be given or taken as the case may require, to be settled by two referees or their umpire.

Held, that the annual sum of 4*l.* 4*s.* was not a freehold ground-rent, but merely a sum in gross payable under a covenant, and consequently the plaintiff was entitled to rescind the contract and recover back the deposit.

Semble, that the 10th condition did not apply to such a case.

ACTION for money received by the defendant for the use of the plaintiffs.—Plea, never indebted.

By the endorsement on the writ, the plaintiffs claimed the *sum [*303 of 282*l.* deposited with the defendant as an auctioneer at a public sale by him on the 3d May, 1860; and, by consent of the parties and order of a Judge, the following case was stated for the opinion of this Court:—

1. On the 3d of May, 1860, the defendant put up for sale by public auction certain property purporting to be freehold ground-rents (whereof the particulars and the conditions of sale are contained in the paper writing marked A, (a) which is to be taken as part of this case).

2. The plaintiffs at the said sale became the purchasers of lot 1, for the sum of 1880*l.*, under and subject to the said particulars and conditions of sale, and paid to the defendant the sum of 282*l.* as a deposit, and in part payment of the purchase-money.

3. The vendors in making out their title produced (inter alia) four counterparts of leases granted by Richard Roy to William Reynolds, and which (so far as the same are material to this case) correspond in form and effect; and the paper writing marked B, (b) which is to be taken as part of this case, is a copy of one of the said counterparts of leases.

4. The plaintiffs delivered to the vendors certain observations and requisitions on the vendors' title, which (so far as it is material) are in the following words:—

“The description of the property in the printed particulars does not appear to accord with that disclosed by the abstracts, the former being that of freehold ground-rents arising out of and secured upon the houses therein mentioned, with the right to the reversion at the expiration of existing leases. Whereas it seems from the abstract that as to that part of the so-called ground-rent described as payable in respect of the gardens, it is not reserved as *issuing out of the houses [*304 demised, but rests entirely upon the personal covenant of William Reynolds the lessee, and that without the remedy of a power of distress; this sum is therefore not a rent at all, but merely a sum in gross, and as it is not payable in respect even of the land demised, it is probable that even the obligation of the covenant would not run with the land so as to bind the assigns; it seems also doubtful whether by the terms of the covenant, so far as appears by the abstract, the lessee has not the option of escaping from the payment by ceasing to

(a) See post, p. 305.

(b) See post, p. 308.

use the gardens. No sufficient title has therefore yet been shown to the ground-rents described in the particulars."

5. The vendors delivered to the plaintiffs certain answers which (so far as is material) are as follows:—

"We are advised by our conveyancing counsel that the purchasers' objection is untenable, and that the garden-rent is as much a rent arising out of the houses as the ground-rent. No technical form of reservation of rent is necessary; words of proviso or words of covenant are quite sufficient for the purpose."

6. The plaintiffs delivered to the vendors certain observations on the said answers which (so far as material) are in the following words:—

"My conveyancer is of opinion that this requisition No. 1 is a valid objection to the title, and has not been satisfactorily answered. Conceding that a reservation of rent does not require technical words, yet it does not follow that a covenant to pay a sum of money is always sufficient; and though in this case it is certainly called a rent, yet it is expressed to be in consideration not of the houses and premises demised, but of the use of the garden, a distinct rent of 15*l.* being reserved in respect of the former: that this circumstance brings the case very nearly to that reported in 12 Modern Reports 74, and that *305] it is at least *very doubtful whether either the benefit or the obligation of the lessees' covenant to pay this so-called rent would run with the land."

7. The vendors delivered to the plaintiffs the following answer to the last-mentioned observations.

"We are further advised by our counsel that the present case does not at all resemble that in Modern Reports 74. In the present case the demise of the ground is expressly in consideration of the rents hereinafter reserved, and then there is an express reservation of the 15*l.* ground-rent, and an implied reservation of the 4*l.* 4*s.* rent, and there is a proviso to re-enter upon all the property demised in case either of the rents had been in arrear."

In consequence of the above objection to the vendors' title, the treaty for the sale of the said premises came to an end, and the present action was commenced to recover the deposit.

The question for the opinion of the Court is whether the plaintiffs are entitled to recover the deposit. If the Court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiffs for the sum of 282*l.* and their costs. If the Court shall be of opinion in the negative, then judgment shall be entered for the defendant, with costs.

The material parts of the Particulars were as follows:—

KENSINGTON PARK, NOTTING HILL.

The whole of the
FREEHOLD GROUND-RENTS,
Included in this Sale,
ARE MOST ABUNDANTLY SECURED,
And Mr. ROBINS has much pleasure in recommending them to Capitalists as

THE MOST ELIGIBLE INVESTMENTS

That can possibly be met with, especially at the present high price of the Funds:

*They arise from

[*306]

RESIDENCES OF A SUPERIOR DESCRIPTION,

Well and substantially erected, and completed for the perfect accommodation of Families of respectability, with Gardens, Situate in a favourite and improving locality, at a convenient distance from Town, and with rapid communication to all parts.

The Houses forming

LANSDOWNE TERRACE,
HANOVER TERRACE,
LANSDOWNE CRESCENT
VILLAS,

LANSDOWNE ROAD VILLAS,
CLARENDON ROAD VILLAS,
AND ST. JOHN'S VILLAS,

With

EXTENSIVE AND BEAUTIFUL ORNAMENTAL GARDENS

At the rear of part these Premises;

These Gardens will remain in the hands of the Freeholder, and will be kept up by him as Ornamental Gardens, a sufficient sum being reserved and set aside for the purpose.

THE VALUABLE REVERSION TO THE PROPERTY,

At the expiration of the Leases, will in each case be included in the purchase.

THERE IS NO LAND TAX ON THE PROPERTY.

N. B.—A plan showing the Property for Sale may be seen at the Offices of Messrs. Roy and Cartwright, No. 4, Lothbury, and at Mr. Robins, Waterloo Place, Pall Mall.

The Properties Sold are to be taken as those comprised in the Leases mentioned in the following Particulars.

The Counterparts of the Leases will be produced at the Sale.

The following Freehold Ground-Rents are secured upon the attractive Residences in the most esteemed part of the Kensington Park Estate, at Notting Hill, One Guinea a *Year being allowed from each of the Garden Rents for the use and keeping up of the Ornamental Pleasure Garden. [*307]

Lot 1.

FOUR FREEHOLD GROUND-RENTS of £19. 4s. EACH,
Viz. £15 Ground-Rent and £4. 4s. Garden-Rent,
Amounting to £76. 16s. a Year.

Arising from the Four Capital Residences,
Nos. 5, 6, 7, and 8, LANSDOWNE CRESCENT VILLAS,
Of the Annual Value of £384.

Held by Four Leases, granted to Mr. William Reynolds, for a Term of Ninety-five Years Each (wanting ten days), from the 29th day of September, 1844,

WITH REVERSION TO THE PROPERTY IN ABOUT EIGHTY YEARS.

The material parts of the Conditions of Sale were as follows:—

" 8. Upon payment of the remainder of the purchase-money by any purchaser at the time above mentioned, the vendor and all other necessary parties will execute to the purchaser a proper conveyance of the property contracted for, such conveyance to be prepared by and at the expense of such purchaser, and the draft thereof to be left or tendered at the office of the said Messrs. Roy and Cartwright fourteen days at least before the said 24th day of June next. The conveyances of lots 1, 2, 3, 4, 8, and part of lot 9, and lots 11, 12, 13, 17, 18, 19, and 20, shall respectively contain a grant on the part of the vendor, of the perpetual right of user of the respective gardens now enjoyed by the tenants of each house comprised in such lots respectively, as appurtenant to each house, and the purchaser shall in consideration of such grant of user, by deed grant to the vendor a perpetual *308] yearly rent-charge of 1*l.* 1*s.* out of each such house, *with the usual powers of distress and entry for securing the same; such several deeds of grant of rent-charge are to be according to forms already prepared, which may be seen at the office of Messrs. Roy and Cartwright, and will be prepared by and at the expense of the vendor, but no title to the gardens is to be required by any purchaser."

" 10. If any mistake be made in the description of the property, or any error or mis-statement whatsoever shall appear on the particulars, such mistake, error, or mis-statement shall not vitiate or annul the sale, but a compensation or equivalent shall be given or taken, as the case may require, to be settled by two referees or their umpire, one referee to be nominated by each party, within fourteen days after the discovery of such mistake, error, or mis-statement, and notice thereof given to the other party, and in case either party shall neglect or refuse to nominate a referee within the time aforesaid, the referee of the other party may proceed alone; if two referees are appointed, they shall nominate an umpire before they enter upon the consideration of the matter referred to them, and the decision of such referees, referee, or umpire, as the case may be, shall be final."

The material parts of the indenture were as follows:—

" This Indenture made the 12th day of September, 1845, between Richard Roy, of, &c., of the one part, and William Reynolds, of, &c., of the other part: *Witnesseth that in consideration of the costs and charges incurred and to be incurred in erecting and completing the messuage and buildings hereinafter described, and in consideration of the yearly rents hereinafter reserved, and of the covenants and agreements hereinafter contained, and by and on the part of the said W. Reynolds, his executors, administrators, and assigns to be performed, fulfilled, and kept: He the said R. Roy hath demised and leased and by *309] these presents doth *demise and lease unto the said W. Reynolds, his executors, administrators, and assigns, all that piece of ground situate at Notting Hill, in the parish of St. Mary Abbots, Kensington, in the county of Middlesex, &c., abutting north on premises called No. 9, Lansdowne Villas, south on other premises called No. 7, Lansdowne Villas, west on the road called Lansdowne Crescent, and east on a piece of ornamental enclosure demised by J. Ladbroke, Esq., to the said R. Roy, together with the brick messuage, tenement, or dwelling-house, and the offices erected and built on the said piece

of ground or on some part thereof, and called No. 8, Lansdowne Villas aforesaid: To have and to hold the said piece of ground, messuage, or tenement and all other the premises hereby demised or intended so to be, with their and every of their appurtenances, unto the said W. Reynolds, his executors, administrators, and assigns, from the 29th day of September, 1844, for and during and unto the full end and term of 95 years (wanting 10 days), and fully to be complete and ended: Yielding and paying therefore yearly and every year during the said term unto the said R. Roy, his executors, administrators, and assigns the yearly rent of 15*l.*, the said rent to be paid free from all deductions whatsoever, and to be payable by even and equal quarterly payments on, &c. And this indenture further witnesseth that for the considerations aforesaid, and also in consideration of the further rent hereinafter reserved and of the covenants and agreements hereinafter contained on the part of the said W. Reynolds, his executors, administrators, and assigns, he the said R. Roy, his executors, administrators, and assigns, doth hereby covenant and agree with and to the said W. Reynolds, his executors, administrators, and assigns, that it shall be lawful for him the said W. Reynolds, his executors, administrators, and assigns, and the tenants and occupiers for the time being of the *messuage and premises hereby demised, and all or any of the mem- [*310
bers of the families of such tenants or occupiers respectively, either attended or unattended by their domestic servants, from time to time and at all times hereafter during the continuance of the said term of 95 years wanting 10 days, at their respective wills and pleasures, to enter into and upon and use and enjoy as a pleasure ground or garden the piece of land particularly delineated and described in the plan or ground plot thereof drawn in the margin of these presents, and therein coloured green, and the ornamental enclosure formed thereon, jointly with the said R. Roy, his executors, &c., and the tenants and occupiers of the dwelling-houses at Kensington Park, Notting Hill, &c. And also that the said R. Roy, his executors administrators, and assigns, shall and will from time to time and at all times hereafter during the continuance of the said term of 95 years, wanting 10 days, at his and their own costs and expenses, keep or cause to be kept in good order and cultivation the said pleasure and ornamental enclosure and the walks therein. And the said W. Reynolds for himself, his executors, administrators, and assigns, doth hereby covenant, promise, and agree with and to the said R. Roy, his executors, administrators, and assigns, that he the said W. Reynolds, his executors, administrators, and assigns, or some or one of them, shall and will during the continuance of the term hereby granted, well and truly pay or cause to be paid unto the said R. Roy, his executors, administrators, and assigns, the said yearly rent hereinbefore reserved in the proportions and upon the respective days appointed for the payment thereof according to the true intent and meaning of these presents, without any deduction, defalcation, or abatement thereof; and also the further yearly rent or sum of 4*l.* 4*s.* to and in respect of the right of user hereinbefore granted of the said garden or pleasure ground, such last-mentioned *rent to be payable on the days [*311
and in all respects in a similar manner with the rent of 15*l.* per annum hereinbefore reserved and made payable. Provided always

and these presents are upon this express condition that if the said yearly rents hereinbefore reserved, or any part thereof, shall be in arrear and unpaid by the space of 21 days next after any of the days or times on which the same ought to be paid as aforesaid, or if the said W. Reynolds, his executors, administrators, or assigns, shall not well and truly perform and keep all and singular the covenants, provisoes, conditions, and agreements hereinbefore contained, and on his and their part and behalf to be observed, performed, and kept, according to the true intent and meaning of these presents, then and in any or either of the said cases it shall be lawful for the said R. Roy, his executors, administrators, or assigns, at any time or times thereafter into or upon the said premises or any part thereof in the name of the whole wholly to re-enter and the same to have again, retain, repossess, and enjoy as in his and their first and former estate, and the said W. Reynolds, his executors, administrators, and assigns, and all other tenants and occupiers of the said premises thereout and from thence utterly to expel, put out, and amove, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said R. Roy, for himself, his executors and administrators, doth hereby covenant, promise, and agree to and with the said W. Reynolds, his executors, administrators, and assigns, that he the said W. Reynolds, his executors, administrators, and assigns, paying the said yearly rents hereby reserved when and as the same shall become payable, and observing and performing, fulfilling and keeping all and singular the covenants, conditions, and agreements hereinbefore contained, on his *312] and their part to be observed, performed, and kept, according to the true intent and meaning of these presents, shall and lawfully may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage and premises hereby demised, with their and every of their appurtenances, for and during the said term hereby granted, without any lawful let, suit, trouble, denial, eviction, or interruption of, from, or by the said R. Roy, his executors, administrators, or assigns, or any other person or persons claiming or to claim, by, from, or under him or them.

Rochfort Clarke, for the plaintiffs.—The plaintiffs are entitled to recover the deposits. They purchased a freehold ground-rent in the strictest sense of the term, but the garden-rent is not a ground-rent. The particulars describe the subject-matter of sale as freehold ground-rents from residences of a superior description, "with the valuable reversion to the property;" and they state that "the whole of the freehold ground-rents included in this sale are most abundantly secured," and that "the valuable reversion to the property, at the expiration of the leases, will in each case be included in the purchase." Lot I., which the plaintiffs purchased, is described as consisting of "four freehold ground-rents of 19*l.* 4*s.* each, viz., 15*l.* ground-rent and 4*l.* 4*s.* garden-rent, arising from four capital residences," &c., "with the reversion to the property in about eighty years." [MARTIN, B.—The garden-rent is not a ground-rent. The indenture of the 12th September, 1845, does not demise to the lessee the soil in the garden: there is only a covenant by the lessor that the lessee and occupiers of the houses shall be at liberty to use the garden, and a covenant by the lessee that he will pay the yearly rent of 4*s.* for the right to use it. It is a mere sum in gross. POLLOCK,

C. B.—*Suppose the leases of all the houses were bought by different persons, to whom would the garden belong when the leases expired?—The Court then called on

Macnamara, for the defendant.—First, according to the true construction of the lease, the yearly sum of 4*l.* 4*s.* is a "rent," as described in the particulars of sale. The demise is in consideration of the yearly *rents* thereafter reserved, and by the *reddendum* a yearly rent of 15*l.* is reserved. Then, in consideration of the further rent of 4*l.* 4*s.* thereafter reserved, the lessor grants to the lessee and the occupiers of the houses the right to use the garden; and there is a covenant by the lessee to pay the yearly rent of 15*l.* and also the further rent of 4*l.* 4*s.* There is also a proviso for re-entry if the yearly *rents* thereinbefore reserved are in arrear, and there is a covenant for quiet enjoyment upon payment of the *rents* and performance of the covenants. [CHANNELL, B.—Could the lessor distrain for the garden-rent?] By the 8th clause of the conditions, no title to the gardens is to be required by any purchaser, but a perpetual right of user of the gardens is contemplated. [POLLOCK, C. B.—That is repugnant to what is professed to be sold. BRAMWELL, B.—Suppose the assignee of the owner of the gardens thought fit to exclude the occupiers of the houses from the gardens, would they have any remedy? Does the covenant run with the land?] It is submitted that it does. An intention is indicated on the face of the lease that the yearly sum of 4*l.* 4*s.* shall be a rent, and that there should be the same remedy for its recovery as in respect of the 15*l.* rent. In Rolle's Abridg., tit *Reservation* (L.) 40, pl. 6, it is said:—"Si A. leas terre al B. per indenture, et les parolls tout, in consideration del payment del rent hereafter mentioned il leas, &c., et puis en mesme indenture B. covenant pur luy et ses assigns ove A. et ses assigns a paier 10*l.* rent en certain feasts annuelment, &c., ceo serra un rent et nemy un somme en gross, car sur tout l'indenture ceo serra un reservation et nemy un covenant, car les parolls (en consideration del rent hereafter mention) fait ceo assets clear, M. 12 Ja. B. R. enter Athowe and Heming: adjudge." [MARTIN, B.—Here the two sums of 15*l.* and 4*l.* 4*s.* are reserved separately.] The demise is in consideration of the *rents* thereafter reserved, and there is a right of entry on the non-payment of either of them. [MARTIN, B.—The right to use the gardens is an incorporeal hereditament, and rent cannot issue out of an incorporeal hereditament.] It issues out of the land demised. In *Williams v. Hayward*, 28 L. J., Q. B. 371, the plaintiff demised to the defendant certain mines and minerals, with power of getting the same and with a right to use a certain railway, at a royalty which should not be less than 100*l.*, and it was held that a rent was created which issued out of the mines and minerals, and could not have issued out of the easement to use the railway. [BRAMWELL, B.—When a man buys a ground-rent, he buys the reversion to land upon which there are buildings out of which a rent issues. The plaintiffs supposed they were purchasing land which was built upon, and for which the tenant was paying a rent of 19*l.* 4*s.* a year, but it turns out that he was paying a ground-rent of 15*l.* and a sum of 4*l.* 4*s.* for the right to use the garden. [POLLOCK, C. B.—A freehold ground-rent means a freehold with a rent issuing out of it. Here there is a mere covenant

to pay a sum in gross.] In an Anonymous case, 12 Mod. 74, Holt, C. J., said:—"A rent may be reserved on words of covenant; but where there is a rent reserved, and a covenant also for other money in the same deed, debt will not lie for the latter; as if I demise twenty acres, reserving 20*l.* a year, and further agree with him in the same *315] deed that, for as many acres as he shall *plough up, he shall give ten shillings more for each per annum; this last sum is no rent, and an action of debt will not lie for it." In the case there put, the demise was not in consideration of the latter sum, but was merely in the nature of a penalty. The 8th clause must be read as if incorporated with the description of Lot I. [POLLOCK, C. B.—That clause cannot alter the subject-matter of the sale.] If there is any conflict between the conditions and the descriptions, the former ought to prevail. At all events the description may be modified by the conditions.—Secondly, the plaintiffs had notice by the particulars that the ground-rents arose from houses held by four leases, and therefore they were bound to look at them. A purchaser who buys with notice of a lease has notice of its contents: *Hall v. Smith*, 14 Ves. 426. Therefore the plaintiffs bought such freehold ground-rents as were described in the leases, and the defendant offered them that which they bargained for.—Thirdly, this is a mere mistake in the description of the property, which, under the 10th clause of the conditions, does not vitiate or annul the sale, but only entitles the plaintiff to compensation, the amount of which is to be settled by two referees or their umpire. The plaintiffs ought not to have rescinded the contract, but to have required compensation. [CHANNELL, B.—That clause does not apply where any substantial part of the property turns out to have no existence or cannot be found, or where the vendor has given a very exaggerated description of the property: *Robinson v. Musgrove*, 2 Moo. & R. 92.]

Rochfort Clarke was not called upon to reply.

*316] POLLOCK, C. B.—I am of opinion that the plaintiffs are *entitled to recover the deposit. I think so because in the case presented to us an objection is raised by the purchasers to the vendor's title, which is not answered by him. It appears that, in consequence of that objection, the treaty for the sale came to an end; and the plaintiffs now seek to recover the deposit. By the assent of both parties, the only question for our opinion is whether the plaintiffs are entitled to recover it.

Now the matter in dispute is whether this yearly sum of 4*l.* 4*s.* is a freehold ground-rent. The plaintiffs say that it is not, the defendant says it is. The defendant does not say that there is a mere mistake in the description of the property, which under the 10th condition does not vitiate or annul the sale, but the question between the parties is whether this is a freehold ground-rent or not. If it is, the plaintiffs must accept a conveyance or forfeit their deposit; if it is not, they are entitled to recover the deposit. That is the way in which the case is presented to us, and I am clearly of opinion that this yearly sum of 4*l.* 4*s.* is not a freehold ground-rent. It is perhaps better not to indulge in any speculative opinion on a point not before us, but certainly it may be doubtful whether the 10th clause of the conditions would cover every possible misdescription and deviation from what

is professed to be sold. My impression is that it was only intended to apply to mistakes such as where land is described as of a certain quantity, and it turns out to be more or less, and not to substantial and solid deviations from what is professed to be sold. It is also doubtful whether the 8th clause can operate so as entirely to alter the nature of what is professed to be sold, but on that point I give no opinion. My judgment proceeds solely on the question whether this yearly sum of 4*l.* 4*s.* is a freehold ground-rent, and it certainly is neither a freehold ground-rent nor a rent.

*MARTIN, B.—I am also of opinion that the plaintiffs are entitled to recover the deposit. I agree with Mr. *Macnamara* [*317 that we ought to look at the substance of the transaction, and see whether the vendees could have got that which they agreed to buy. Now the vendor agreed to sell "four freehold ground-rents of 19*l.* 4*s.* each, viz., 15*l.* ground-rent and 4*l.* 4*s.* garden-rent, amounting to 76*l.* 16*s.* a year, arising from the four capital residences, Nos. 5, 6, 7, and 8 Lansdowne Crescent Villas, of the annual value of 384*l.*, held by four leases granted to Mr. William Reynolds for a term of ninety-five years each (wanting ten days), from the 29th of September, 1844, with reversion to the property in about eighty years." Then we have to ascertain whether or no the vendees could in substance and reality have got that which the vendor professed to sell. That depends upon the construction of the lease of the 12th of September, 1845, between Richard Roy of the one part and William Reynolds of the other part. It is true that the demise is in consideration of the yearly *rents* therein-after reserved, and the 4*l.* 4*s.* payable yearly is called a "rent," but it is not so in the proper sense of the term. A "rent" is a thing well known to the law. It is the reservation of a sum of money, with certain incidents annexed to it. This yearly sum has none of the essential qualities of a rent. The indenture describes by metes and bounds the land and house which are demised for a term of ninety-five years (wanting ten days), "yielding and paying *therefore*, yearly and every year during the said term, unto the said Richard Roy, his executors, &c., the yearly sum of 15*l.*" So that there is a rent of 15*l.*, which is declared to issue out of the house, and nothing else. The indenture further witnesses "that for the considerations aforesaid, and also in consideration of the further rent thereafter reserved, and of the covenants and agreements thereafter contained *on the part of the said W. Reynolds," &c., "the said R. Roy doth [*318 hereby covenant and agree with and to the said W. Reynolds, his executors, &c., that it shall be lawful for him the said W. Reynolds, his executors, &c., and the tenants and occupiers for the time being of the messuage and premises hereby demised, and all or any of the members of the families of such tenants or occupiers respectively, &c., from time to time, and at all times hereafter during the continuance of the said term of ninety-five years (wanting ten days), at their respective wills and pleasure, to enter into, upon, and enjoy as a pleasure ground or garden the piece of land particularly delineated and described in the plan, &c., and the ornamental enclosure formed thereon," &c. Therefore it is perfectly clear that the land itself is not demised, but there is merely a grant of a right to enter upon and enjoy it as a pleasure ground. In the judgment in *Wood v. Lead-*

bitter, 13 M. & W. 838,† it was said that such a right is in the nature of an incorporeal hereditament. There is not even a reservation of rent, but simply a covenant by W. Reynolds that he will, during the continuance of the term, pay "the further yearly rent or sum of 4*l.* 4*s.* in respect of the right of user hereinbefore granted of the garden or pleasure ground." There is therefore a substantial objection to this sum of 4*l.* 4*s.* being a "rent," because it is essential to a rent that it should issue out of a corporeal hereditament, which this sum does not. No distress could be levied for this sum of 4*l.* 4*s.*, for there is no reservation of rent, but a mere covenant by Reynolds to pay this annual sum during the continuance of the term. I doubt whether an action of debt could be maintained by the plaintiffs against W. Reynolds for the recovery of this sum (assuming the plaintiff had a conveyance), for it is not an annuity or rent-charge, but merely a
 *sum in gross. I am disposed to think that the only mode in
 *319] which it could be recovered would be by an action at the suit of Roy against Reynolds. At the utmost it is a yearly payment of 4*l.* 4*s.* for eighty years, and then it is at an end, the plaintiffs having during that time a right to enjoy the pleasure ground.

With respect to the 10th clause of the conditions, it has not been relied on by the vendor. If he had stated that there was a mistake in the description of the property, and had offered an adequate compensation, I do not say what the consequence would have been. But the vendees delivered to him the real objection to his title, and his answer was, not that there was an error in the particulars of sale, but that there was no mistake whatever; and the result (as stated in the case) was that, "in consequence of the above objection to the vendor's title, the treaty for the sale of the premises came to an end." From that I understand that neither party desired to act upon the 10th clause of the conditions; and, as the objection to the vendor's title is good, the plaintiffs are entitled to recover the deposit.

BRAMWELL, B.—I am of the same opinion. I think, for the reasons given by my brother Martin, that this yearly sum of 4*l.* 4*s.* is not a freehold ground-rent which could be distrained for; but I cannot entertain a doubt that it is not a ground-rent within the meaning of what the plaintiffs supposed they purchased. The plaintiffs intended to purchase the reversion of land on which buildings had been erected, and for which, so long as the lessee occupied the whole, he was bound to pay a ground-rent of 19*l.* 4*s.* I cannot doubt that if the lessee was evicted from the garden he would be under no obligation to pay the yearly sum of 4*l.* 4*s.* It may be that he could not be permanently evicted, because, if an assignee of the lessor had notice of the lease,
 *320] he would *be affected in equity with notice of the covenant by the lessor that the garden should be a perpetual garden for the use of the tenants of the houses, and upon proceedings in equity being taken the garden might ultimately be restored to the enjoyment of the lessee, who would then be liable to pay the 4*l.* 4*s.* a year. But that is not a ground-rent in the sense in which that expression is used.

The next point has been already answered by my Lord. The 8th clause of the conditions does not give notice to a purchaser that there may be such an essential difference between the thing sold and

that described. My brother Martin has given an answer to the point raised upon the 10th clause of the conditions. That clause does not mean that if the parties differ as to whether there is a mistake, but if they agree that there is a mistake, compensation is to be given, and the amount is to be settled by two referees or their umpire. Whether or no there is a right to the compensation is not to be settled by the referees, but only the amount of compensation. Here the parties did not act under that clause; but the vendees claimed to rescind the contract on the ground of the objection to the vendor's title; the vendor said that there was no defect in his title. After that it seems to me impossible to rely on the 10th clause. For these reasons I agree that the plaintiffs are entitled to recover the deposit.

CHANNELL, B.—This is an action to recover the amount of a deposit paid on the purchase of certain ground-rents, and I think that the plaintiffs are entitled to judgment. I agree that we must look at the substance of the transaction, not excluding the conditions so far as they throw any light on the nature of the contract. The contract is in substance this—the plaintiffs purchased freehold ground-rents issuing out of residences described in the particulars of sale. As *to the sum of 4*l.* 4*s.* payable in respect of the garden, I think [*321 that it is not a ground-rent; but, assuming that it is, it is not a freehold ground-rent.

It is said that there is a rule of equity, that if the purchaser of property held under a lease has notice of the lease, he has notice of everything contained in the lease. I do not propose to dissent from that rule so far as it lays down the general principle that, if there are covenants in a lease of such a restrictive character that the value of the property is rendered less than it otherwise would be, the purchaser, by omitting to look at the lease, takes upon himself those covenants. But I cannot think it necessary for a purchaser to call for a lease for the purpose of seeing whether a person who purports to sell one thing is giving another.

Then it is said that, supposing there is some error in the description, the plaintiffs' remedy is under the 10th clause of the conditions. I agree with my brother Bramwell that that imports an agreed difference to exist, the compensation for which is matter of dispute, and that is what is to be settled by the referees. But, supposing that is not the true construction of the 10th clause of the conditions, we must look at this case as the parties have brought it before us, and I think the true view is, that the defendant has admitted the right of the plaintiffs to rescind the contract provided they have not been offered that which they purchased under the name of freehold ground-rents.

Judgment for the plaintiffs.

*CURLEWIS v. BROAD. *June 9.*

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A process server is not liable to an action for a breach of duty in neglecting to endorse on a writ of summons the time of service, as required by the 15th section of the Common Law Procedure Act, 1852.

DECLARATION.—That after the passing and coming into force of the
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Common Law Procedure Act, 1852, and before and at the time of the defendant's employment, as hereinafter mentioned, the defendant was a process server and the business of a process server exercised and carried on; and the defendant before such employment had on divers occasions been employed by the plaintiff and other persons to serve writs of process on the persons against whom such writs were issued; and the defendant had served such writs and had duly endorsed on such writs the endorsements of the time of such service within the time and as was and is required by the said statute. And thereupon, after the coming into force of the said Act, the plaintiff commenced an action in her Majesty's Court of Exchequer, &c., against one W. Wignall, for the recovery of a debt justly due to the plaintiff from the said W. Wignall, by the plaintiff causing to be issued a writ of summons out of the said Court against the said W. Wignall at the suit of the plaintiff, in the form and under and according to the said Act, and which said writ the plaintiff caused to be duly endorsed with the endorsements required by the Act, and also to be specially endorsed with the particulars of the plaintiff's claim, according to the said Act, in the special form therein provided.—(The declaration then set out the endorsements.)—And thereupon the plaintiff retained and employed the defendant as such process server to serve the said writ of summons upon the said W. Wignall, according to the provisions of the said Act of Parliament, for reward to the defendant in that behalf; and for that *323] purpose the plaintiff at the same time caused *the said writ of summons, with the said endorsements thereon, together with a copy of such writ and endorsements, to be delivered to the defendant as such process server for the purpose aforesaid, and the defendant as such process server accepted such retainer and employment, and received the said writ with the said endorsements thereon, and the said copy of the said writ and of the said endorsements thereon, from the plaintiff for the purpose aforesaid. And thereupon the plaintiff as such process server, in consideration of the premises, promised the plaintiff that in case he, the defendant, should serve the said writ upon the said W. Wignall, that he, the defendant, would do and perform his duty in that behalf.—Averments: that the defendant did afterwards personally serve the said writ of summons with the said endorsements thereon upon the said W. Wignall, according to the said Act: that all things have happened, &c., to entitle the plaintiff to have the defendant do and perform his duty in that behalf.—Breach: that the defendant as such process server did not do or perform his duty in that behalf in this: that he did not nor would, within three days after such service of the said writ on the said W. Wignall, endorse on the said writ the day of the month and week of such service thereof as required by the said Act, and as he ought to have done, but wholly omitted and neglected so to do: that although the said W. Wignall did not cause any appearance to be entered in the said action to the said writ, according to the exigency of the said writ, and made default in such appearance, yet by reason of the defendant's said neglect and omission of his said duty, &c., the plaintiff was wholly hindered and prevented from signing final judgment in the said action against the said W. Wignall, as he might and ought and otherwise would have been entitled to have done and would have done, at the

expiration of eight days after such service of the said writ, *inclusive of the day of such service; and thereby the said service [*324 of the said writ and the expense thereof became and were wholly useless and of no avail, &c.

Plea.—That the defendant, before and at the time of the alleged employment in the declaration mentioned, was not retained or employed or instructed in any way to endorse on such writ of summons the time of service thereof as required by the 15th section of the Common Law Procedure Act, 1852; and that he never was at any time retained or employed by the plaintiff, or any other person for him, to do more than serve the said writ, and was not at any time requested or directed to make such endorsement.

Demurrer, and joinder therein.

T. H. Cole, in support of the demurrer.—The plea affords no answer to the action. The defendant having, as a process server, accepted the employment to serve the plaintiff's writ, it was the duty of the defendant to endorse on it the time of service, as required by the 15th section of the Common Law Procedure Act, 1852. That section enacts, that "the person serving the writ of summons shall, and he is hereby required, within three days at least after such service, to endorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed under this Act; and every affidavit of service shall mention the day on which such endorsement was made." The statute therefore casts upon the server of the writ an express duty, the neglect of which has precluded the plaintiff from proceeding to sign judgment for want of an appearance. [CHANNELL, B.—Is it not the duty of the attorney to see that the endorsement is made?] Perhaps the attorney sends the writ into the country at a distance to be served. [MARTIN, B.—Suppose the defendant had pleaded that he was told *by his [*325 employer to serve the writ but not to endorse on it the time of service.] In that case he would be excused, but in the absence of any directions it was his duty to endorse the writ. [CHANNELL, B.—The Act says "the person serving the writ;" therefore, if the fact of being employed to serve it raises a duty, if an attorney sent the writ in a letter to a friend and asked him to serve it he would be bound to endorse it.] The words of the statute are imperative, "and he is hereby required." [CHANNELL, B.—The attorney may serve the writ himself, or by his clerk or agent. A process server is his agent, and if there is no endorsement of the time of service, the attorney is liable for a breach of duty.] Whatever be the liability of the attorney, the person employed is also responsible for his neglect of duty. [POLLOCK, C. B.—Suppose the attorney said:—"Serve this writ, but I do not care about its being endorsed with the time of service, as in the event of non-appearance I shall not sign judgment." The statute merely says, if in the case of non-appearance the plaintiff intends to proceed under that Act the writ must be endorsed. CHANNELL, B.—The argument for the plaintiff would be the same, if an attorney knew a boy at school and sent the writ in a letter to him to serve.] The declaration alleges that the defendant carried on the business of a process server, and therefore it must be implied that he knew his duty. A person who undertakes an employment is bound to bring

competent skill to the performance of the service: *Harmer v. Cornelius*, 5 C. B., N. S. 236 (E. C. L. R. vol. 94). [*MARTIN, B.*—The plea is an argumentative traverse of the alleged employment, and would formerly have been bad on special demurrer.]

J. E. Davis appeared for the defendant, but was not called upon to argue.(a)

*326] *Per CURIAM.(b)—The plaintiff may have leave to amend by taking issue on the plea, otherwise judgment for the defendant. Judgment accordingly.

(a) The defendant's points for argument were as follows:—

1st. That the object or effect of the 15th section of the Common Law Procedure Act is not to throw an absolute unconditional duty on every person who serves a writ of summons to make the endorsement therein mentioned, but only to give the party requiring the endorsement a right to require the making of it, and no action will lie for not doing it without showing a request or a contract.

2d. That the declaration is bad in substance, because it relies on a breach of a supposed duty, and the law does not imply any such duty from the facts stated in the declaration alone.

3d. That it is consistent with the allegations in the declaration that the defendant, when employed to serve the writ, may have been requested to delay or defer making the endorsement, or not to make it at all, and in such a case there would be no retainer or duty to make the endorsement and no cause of action for not doing it, and such a case would be admissible to proof under the plea, and if proved would be a defence to the action.

4th. The declaration should have alleged, not only that the defendant was employed to serve the writ, but to make the endorsement, which is a distinct and subsequent act, and the facts alleged in the beginning of the declaration might have been evidence to prove such a retainer although the endorsement might not have been expressly mentioned in the defendant's instructions, but they do not amount in point of pleading to such an allegation, for they are only a statement of evidence, and of evidence which might or might not prove it.

(b) Pollock, C. B., Martin, B., and Channell, B.

WILLIAM THORPE and HANNAH PIRKIN v. ELIZABETH THORPE. *June 2.*

A testator named Henry Thorpe devised his real estate to trustees to permit his son Henry to receive the rents thereof during his life; and after his decease, the testator devised the property to the heirs of the body of his son Henry, and for want of such issue to the testator's nephew Henry for life, and after his death to the testator's "*right heirs of the name of Henry Thorpe, if any such there should then be, for ever.*"—Held, that the ultimate limitation was a contingent remainder which would vest in the person who at the time of the nephew's death filled the character of a right heir of the testator and had the name of Henry Thorpe; but, there being at that time no person who answered both descriptions, the property vested in the testator's heir at law.

EJECTMENT to recover possession of a messuage and lands at Preston Bisset, in the county of Buckingham.

*327] *The cause came on for trial, before Erle, C. J., at the Buckinghamshire Summer Assizes, 1861, when a verdict was entered for the plaintiff William Thorpe, subject to the opinion of the Court on the following special case:—

The property sought to be recovered consists of a house, home-
stead, and fifty acres of land, of which one Henry Thorpe, hereafter
called the testator, who died on the 21st October, 1820, before and at
the several times of making his will and of his death, was seised in
fee simple in possession. The testator's will, dated the 29th of Sep-
tember, 1804, was (so far as material to the present case) as follows:—

"I give and devise all that my messuage or tenement with the homestead and appurtenances thereto belonging, and also those my several closes, &c., situate in the parish of Preston Bissett, in the county of Bucks, and now in my own occupation, and all and every other my messuages, lands, and real estates whatsoever and wheresoever, unto J. King, J. Kearse, and W. Thornton, their heirs and assigns, during the natural life of my son Henry Thorpe, upon this special trust and confidence in them reposed, and to the intent and purpose that they the said J. King, J. Kearse, and W. Thornton and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall permit and suffer my said son Henry Thorpe to take, have, hold, occupy, possess, and enjoy the said messuage or tenement, hereditaments and premises, with the appurtenances (or in case it should be found most expedient to let or lease the same to some other person or persons), to permit and suffer him to receive and take the rents, issues, and profits thereof to and for his own use and benefit for and during the term of his natural life. And I do hereby beseech and request them the said J. King, J. Kearse, and W. Thornton, and the survivors and survivor of them; and the heirs and assigns of such survivor, to advise, direct, and assist my said son Henry Thorpe in the conducting and *management of his business [*328 and affairs, and on account of his incapacity to superintend the same for him. And from and immediately after the decease of my said son Henry Thorpe, I give and devise all and singular the said hereditaments and premises, with the appurtenances, unto the heirs of the body of my said son Henry Thorpe lawfully issuing for ever. And for want or in default of such issue, I give and devise the said hereditaments and premises, with the appurtenances, unto my nephew Henry Thorpe (son of my brother James Thorpe), and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after his decease, I give and devise the said hereditaments and premises with the appurtenances unto my own right heirs of the name of Henry Thorpe, if any such there shall be, for ever."

Henry Thorpe, the son, and Henry Thorpe, the nephew, survived the testator. On the death of the testator, Henry Thorpe the son being a lunatic, his trustees entered into possession of the property and paid the rent to him until his death. Henry Thorpe, the son, died a lunatic and unmarried on the 23d March, 1832. Henry Thorpe, the nephew, then entered into possession of the said estate, and continued in such possession until his death in June, 1843. At the time of the death of Henry Thorpe, the nephew, the nearest relative of the testator having the name of Henry Thorpe was the testator's great-grandnephew, the husband of the defendant and the son of William Thorpe, the plaintiff; and he then entered into possession of the estate and continued in such possession until his death in 1859. At the death of Henry Thorpe, the nephew, the plaintiff's father, one Thomas Thorpe, who was the son of Thomas Thorpe the next brother to the testator, was then alive and was then the heir at law of the testator, as the following agreed pedigree shows:—

*Thomas Thorpe, the father of the plaintiff, died intestate on the 21st of September, 1845. The plaintiff, William Thorpe, [*330 was his eldest son. Henry Thorpe, the great-grandnephew, died in the early part of the year 1859, leaving lawful issue alive. The plaintiff, William Thorpe, contends that he is entitled to the property as heir at law; and that on the death of the nephew there was no person alive who then satisfied the description in the will, "my own right heirs of the name of Henry Thorpe."

The plaintiff, Hannah Pitkin, claims as mortgagee by virtue of a mortgage-deed of the 25th May, 1854, in which the defendant's late husband, Henry Thorpe, the said great-grandnephew of the testator, joined. The defendant contends that on the death of the nephew the property passed by the will to her late husband, Henry Thorpe, the said great-grandnephew of the testator; and that he then satisfied the description in the will, "my own right heirs of the name of Henry Thorpe."

The question for the opinion of the Court is whether on the death of Henry Thorpe, the testator's nephew, the plaintiff's father or the defendant's husband was entitled to the testator's real estate.

If the Court shall be of opinion that the plaintiff's father was so entitled, the verdict for the plaintiff, William Thorpe, is to be altered into a general verdict for the plaintiffs. If the Court shall be of opinion that the defendant's husband was the person so entitled, the verdict for the plaintiff, William Thorpe, is to be set aside and a verdict entered for the plaintiff, Hannah Pitkin, only; and in that case the defendant is to pay the said Hannah Pitkin her costs of the trial; and the plaintiff, William Thorpe, is to pay the defendant her costs of this case.

D. D. Keane argued for the plaintiffs, in last Easter Term (May 7). —First, if the word "then," in the ultimate *limitation, has [*331 reference to the time of the testator's death, the plaintiff is entitled to recover, because at that time there was no person who answered the description of the testator's right heir of the name of Henry Thorpe. It is a rule of law that estates in remainder shall be construed to vest at the earliest possible period. *Wrightson v. Macaulay*, 14 M. & W. 214,† is an authority that in this case the ultimate limitation took effect in interest on the death of the testator. Therefore no person could take under that devise unless at that time he answered the description in both particulars. The term "right heir" is used in its strict sense. Where a testator devised his lands, in a certain event, to the "right heirs of his name and posterity," it was held that his brother, who was of his name, but was not his heir, was not entitled, and that the devise was void: *Counden v. Clerke*, Hob. 29. So where the devise was to the "right heirs male" of the testator for ever, it was held that, as the testator died, leaving no other issue than three daughters, the devise failed, and did not apply to his next collateral heir male: *Ashenbust's Case*, cited Hob. 34. In *Doe d. Angell v. Angell*, 9 Q. B. 328 (E. C. L. R. vol. 58), the devise was to the "male heirs, if any such there be, of W.," and although it was admitted that the rule was modified, as stated by Lord Hardwicke in *Newcoman v. Bethlem Hospital*, Amb. 8, yet the Court said that, unless there were circumstances to take the case out of the rule, a

claimant must show himself heir general as well as male. In *Doe d. Bailey v. Pugh*, 2 Meriv. 348, the Court of King's Bench put a different construction on the words "right heirs;" but that decision was reversed by the House of Lords, 3 Bro. P. C. 454. Moreover, the ultimate limitation is void for uncertainty. In *Fearne on Contingent* *332] *Remainders*, vol. 1, *p. 252, after observing that a possibility upon a possibility is never admitted by intendment of law, it is said:—"Upon the same ground ariseth the distinction between a remainder limited by a general description, and one limited by a particular name to a person not in esse. In the first case the remainder is good, as a limitation to the right heirs of J. D., who is alive, or primogenito filio of B., who has no son then born; but in the other case the remainder is void, as if a remainder be limited to G., son of D., in that case if D. hath not a son named G. at the time of the limitation, the law will not expect that he should afterwards have a son so named, because it amounts to a possibility upon a possibility, viz., first, that he should have a son, and secondly, that such son should be named G.: *Cholmley's Case*, 2 Rep. 51 b."—Secondly, if the word "then" in the ultimate limitation has reference to the time of the death of the testator's nephew, the devise is void for remoteness: *Jee v. Audley*, 1 Cox 324; *Jarman on Wills*, p. 252, 3d ed.

H. Mattheus, for the defendant (*June 2*).—The ultimate limitation is a contingent remainder, which vested on the death of the second devisee for life. At that time the testator's heir was Thomas, the son of his elder brother, and father of the plaintiff; but he could not take because he did not satisfy both branches of the description. But he had a son, named Henry, who was the great-grandnephew of the testator and husband of the defendant, and he answered both descriptions. If the term "right heirs" be construed in its strict technical sense the devise will fail. *Goodright d. Brooking v. White*, 2 W. Black. 1010, is an authority for construing that term in the sense of "heir apparent." The word "heirs" is nomen collectivum: *Dur-* *333] *dant v. Burchett*, Skinn. 205, 206; **Jarman on Wills*, p. 56, 3d ed. In *Doe d. Winter v. Perratt*, 9 Cl. & F. 606, Lord Cottenham and six of the Judges were of opinion that the words "first male heir" were used to denote a person of whom an ancestor might be living. Lord Cottenham there said:—"Farrington v. Darel, Year Books, 9 Hen. 6, pl. 23, and 11 Hen. 6, pl. 12, the devise, after an estate, was to the testator's next heir male. The contest was between the testator's granddaughter, who was heir, and her son; and no objection was made to his claim because his mother was living. It is admitted that the rule 'nemo est hæres viventis' is not inflexible, and that an heir apparent may take under the description of 'heir,' if such appear to be the sense in which the testator used the term." In *Darbison d. Long v. Beaumont*, 1 P. Wms. 229, the devise was to the "heirs male of J. S." J. S. having a son, and the testator having taken notice that J. S. was then living, that was held a sufficient description of the testator's meaning, and that the son took, though strictly speaking not the heir. Here the testator had a son, brothers and nephews, but he has passed over all heirs apparent not named Henry. [MARTIN, B.—*Wrightson v. Macaulay*, 14 M. & W. 214,† is conclusive.] In that case there were no contingent words as are here

"if any such there shall *then* be." In *Wharton v. Barker*, 4 K. & J. 483, Sir W. P. Wood revised all the authorities as to the time to which the word "then" had reference. That case is an authority that here the word "then" has reference to the time of the death of the testator's nephew, Henry. In the case put in *Fearne on Contingent Remainders*, vol. 1, p. 252, the remainder was limited to a particular person not in esse at the time of the limitation, and therefore no one could take under it. The position rests on the dicta in *The Rector of Chedington's Case*, 1 Rep. 148 a; but in a note to that case (a) [*334 the doctrine there laid down is questioned, and authorities are cited to show that there may be a possibility upon a possibility.

D. D. Keane replied.

MARTIN, B.—The question turns upon the construction of the will of one Henry Thorpe, by which he gave and devised his landed property to trustees during the life of his son Henry, upon trust to permit him to receive the rents and profits thereof for his own use during his life. The testator then goes on to request the trustees "to advise, direct, and assist his son Henry in the conducting and management of his business and affairs, and, on account of his incapacity, to superintend the same for him." Therefore it is clear that the trustees took an estate for the life of the testator's son Henry. The testator then goes on to say, "and from and immediately after the decease of my said son Henry Thorpe, I give and devise all and singular the said hereditaments, premises, &c., unto the heirs of the body of my said son." Now, if the previous devise had given the legal estate to the son Henry for life, the rule in *Shelley's Case*, 1 Rep. 93, (b) would have applied, and he would have *taken an [*335 estate tail. But, inasmuch as he took an equitable interest only for his life, the rule does not apply. The son Henry died without issue, and therefore that estate was at an end. Then the testator, for want or in default of such issue, devises the hereditaments and premises unto his nephew, Henry Thorpe (son of his brother James Thorpe), during his life; and from and immediately after his decease the testator devises the property unto his "own right heirs of the name of Henry Thorpe, if any such there shall then be, for ever." Now, Mr. *Matthews* contended that this estate must vest at the termination of the second estate for life, and he cited *Wharton v. Barton*, 4 K. & J. 483, as an authority for that proposition. Assuming that to be the construction naturally arising from the words of the will, there is an estate for the life of the son Henry; an estate tail for his children, if he had any; an estate for the life of Henry Thorpe the nephew, and a contingent remainder, to arise immediately after the termination of the last life estate, to the testator's own right heirs of

(a) 1 Rep. 156, note (1).

(b) The rule is, that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word "heirs" is a word of limitation; that is, the ancestor takes the whole estate comprised in the term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple.

The learned editors of the 3d edition of *Jarman on Wills* remark that the rule is usually stated in the above general terms, but by the word "limitation" we must understand a limitation by way of remainder, as distinguished from a limitation by way of executory devise or a shifting use, which, though it be to the person taking a previous estate of freehold, vests in the heir as a purchaser.

the name of Henry Thorpe—an estate which would not be void on the ground of perpetuity, for the reasons given by Mr. *Matthews*. The consequence is, that there would be vested in the right heirs of the testator at the time of his death, a contingent reversion in fee (for the law does not allow an inheritance to be in abeyance), subject to be defeated by the particular remainder taking effect upon the death of the nephew. I doubted whether that estate could have any operation, and the same difficulty occurred to my brother Bramwell. But, on consideration, I think it may, and that the true construction of this will is that it was a contingent remainder, to vest, upon the termination of the second devise for life, in the testator's right heir, *336] if there was one, of the name of Henry Thorpe; *and the effect of that would be to defeat any intermediate conveyance of the estate by an intermediate right heir.

Giving that construction to the words of the will, there is a contingent remainder to the person who might fill the character of right heir of the testator at the time the second estate for life terminated, provided his name was Henry Thorpe; but inasmuch as at that time there was no person who answered that description, the devise never took effect. To support the view of Mr. *Matthews*, we must necessarily hold that any person who, at the time of the determination of the second estate for life, might possibly be in the line of descent, however remote, and of the name of Henry Thorpe, would be entitled to the estate. That is a construction which the words of the will do not bear. We give effect to all the words of the will by giving to the term "right heirs" its true construction, and by holding that this was a contingent remainder to the right heir in existence at the determination of the second life estate, provided his name was Henry Thorpe. That estate did not vest in the husband of the defendant, Elizabeth Thorpe, and consequently the plaintiffs are entitled to judgment.(a)

BRAMWELL, B.—I am of the same opinion. We ought to construe this will, not according to what we think the testator meant, but we ought to see what construction has been put upon wills in almost the same words. At first it seems unreasonable to ascertain what A. B. meant by seeing what has been said that C. D. meant in a similar case. But it is more important, with reference to the interest of the possessors of property and their successors, that documents of this kind should receive a uniform construction, than that *337] *the very intention of the testator should be carried into effect. It is immaterial to the public at large whether Henry or Thomas takes an estate, or whether a devise is void or not. There is no abstract justice in the matter: for aught that appears the one is as much entitled as the other. Therefore it is not unreasonable to have certain rules of guidance in construing such documents. If that is so, there is an end of the case, because Mr. *Matthews* admitted that it could not be distinguished from some of those cited. I felt some difficulty upon the argument of Mr. *Keane*, that the limitation in question was void. But I am now satisfied that is not so, and that the words have the meaning pointed out by my brother Martin. I

(a) His lordship stated that the Lord Chief Baron, who had left the Court, was of the same opinion.

think that this case is concluded by authority, and that our judgment ought to be for the plaintiff.

CHANNELL, B.—I was not in Court on the former occasion when the case was argued, and therefore I have not had the advantage of hearing the whole argument; but I have paid the best attention to the case as presented to us to-day, and I agree with the view my brother Martin has expressed. I do not participate in the doubt at one time entertained by my brothers Martin and Bramwell. This rule is laid down by Mr. Jarman in his treatise on Wills, Vol. 2, chap. xxviii., p. 80, 3d ed., that "if the contingency of the devise consists in the uncertainty of the object, as if lands be devised to the person who shall, at a specified time, be the testator's heir of the name of H., no person will be duly qualified to take under the will unless he bears the name at that time."

Judgment for the plaintiff.

*COX and Others v. THE LORD MAYOR, ALDERMEN,
AND COMMON COUNCILLORS OF THE CITY OF [338
LONDON. June 10.

A custom of the city of London, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties are citizens or resident in the city, and neither the original debt nor that due from the garnishee accrued within the city, is void in law.

PROHIBITION.—The declaration stated, that the city of London is, and immemorially has been, an ancient city; and there is, and immemorially has been, a certain Court of her present Majesty, or her Majesty's predecessors, kings or queens in England, holden or to be holden for the said city of London, before the mayor and aldermen of the said city for the time being, in the chamber of the Guildhall of and in the said city. And heretofore, to wit, on the 17th September, 1860, Sarah Buckmaster and Robert Addams, trading as W. Buckmaster and Co., went into the said Court holden for the said city, before the mayor and aldermen, in the said chamber of the Guildhall of and in the said city, and affirmed a plaint against Richard Farquharson, &c., in a plea of debt on demand for, to wit, 86l. 3s.; and it was returned and certified to the same Court that the said R. Farquharson had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the said city and liberties, and the said plaint was returned "nihil;" and thereupon, at the same court, then and there, before the said mayor and aldermen, the said S. Buckmaster and R. Addams surmised and alleged that Richard Cox, C. Hammersley, &c. (naming all the plaintiffs), were debtors to the said R. Farquharson in a certain sum, to wit, the sum of 86l. 3s., and had garnishment against the said R. Cox, C. Hammersley, &c., to warn them to come in and answer whether they were indebted in the manner alleged by the said S. Buckmaster and R. Addams; and the said R. Cox, C. Hammersley, &c., were thereupon warned to come *in, at the said Court holden for the said city, before the mayor and aldermen of the said city, at the said Guildhall of and in [339

the said city, on the 12th October, 1860, and to answer whether they were indebted in the manner alleged as aforesaid; and the said R. Cox, &c., did, at the said last-mentioned Court, by their attorney, come in and appear to the said warning; and the said R. Farquharson has not appeared to the said plaint. And the said R. Cox, C. Hammersley, &c., aver that they, and the said S. Buckmaster and R. Addams, and the said R. Farquharson, did not, nor did any or either of them, at the time when the said S. Buckmaster and R. Addams so went into Court and affirmed the said plaint as aforesaid, reside, dwell, or carry on business, nor have they, or any or either of them, at any time since resided, dwelt, or carried on business, within the said city of London, or the liberties thereof, or within the jurisdiction of the said Court; and that the alleged debt in the said plea in the said plaint so affirmed as aforesaid mentioned, or the said debt alleged to be due from the said R. Cox, C. Hammersley, &c., to the said R. Farquharson in the said garnishment mentioned as aforesaid, did not, nor did either of them, arise or accrue within the said city of London, or the liberties thereof, or within the jurisdiction of the said Court before the said mayor and aldermen of the said city, by means whereof the said Court before the mayor and aldermen aforesaid had not jurisdiction over the said plaint, or the said proceedings thereunder, or over the said garnishment, or over the said R. Cox, C. Hammersley, &c., as garnishees, or over the said alleged debts in the said plaint mentioned, or over the said R. Farquharson, at any time during the said alleged proceedings aforesaid: Nevertheless the said Court before the said mayor and aldermen, and the said mayor and aldermen, did assume to have, and did take upon themselves, jurisdiction in the *340] premises, and did proceed with the said garnishment against the said R. Cox, C. Hammersley, &c., and the said plaint and garnishment are now pending and being proceeded with in the said Court, whereby the said R. Cox, C. Hammersley, &c., are prejudiced, and have sustained damage to the value of 1000*l.*; wherefore the said R. Cox, C. Hammersley, &c., the aid of the Court of the said lady the Queen, before the Barons of her Exchequer, now here, most humbly imploring, pray remedy by the writ of the said lady the Queen, of prohibition to the said mayor and aldermen, in form of law, to be directed to prohibit them from holding and proceeding with the plaint and plea and garnishment aforesaid, the premises aforesaid anywise concerning, further before them.

Plea (inter alia).—That the city of London now is, and immemorially has been, an ancient city, and that there is, and immemorially has been, a custom therein that if any plaint of debt shall be levied or affirmed by any person in the Court of the lord the King, before the mayor and aldermen for the time being, in the Chamber of the Guildhall of the same city, so that by virtue of such plaint the same Court shall command any serjeant-at-mace of the same mayor within the same city, and the minister of such Court, to summon the party defendant in the same plaint specified to appear at the Court of the lord the King, in the chamber of the Guildhall of the same city holden before the mayor and aldermen of such city, to answer the plaintiff in the same plaint named in the plea in such plaint specified; and such serjeant-at-mace and minister at such Court whereat such

plaint shall be levied or affirmed shall, by virtue of such precept, testify by word of mouth, to the same mayor and aldermen, that the defendant in the same plaint named had nothing within the liberty of the city aforesaid whereby he might be summoned, and then the same defendant at the same Court shall make default; and thereupon in such Court the plaintiff named in *such plaint shall testify and allege [*341 by word of mouth, to the same mayor and aldermen, that some other person, for any cause whatsoever, is indebted to such defendant in any sum of money amounting to the debt in the plaint aforesaid specified, or part thereof; then, on the petition of the plaintiff in the same plaint named, the same Court shall command such serjeant-at-mace and the minister that the same serjeant shall attach the defendant in such plaint named by such sum being in the hands or custody of such other person *found within the jurisdiction of the said Court*; and then, if such serjeant-at-mace and minister of the Court return and certify to such court such defendant to be attached according to the said custom by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint named may or might appear at the same or the then next Court holden or to be holden, to answer such plaintiff in the plea in such plaint specified; and if the defendant at that and three other courts then next severally holden or to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults, according to the custom of the said city, are recorded against such defendant at such four Courts after such attachment made, if such plaintiff in such plaint named at every of such four courts in his own person or by his attorney appeared, according to the custom of the said city, then, and at the last of the said four courts, or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the Court, it is and has been used for the Court to command such or any other serjeant-at-mace and minister of the Court to warn such other person, so being found within the said city, according to the custom of the said city, to be and appear at any Court afterwards to be *holden before the mayor and aldermen of the said city, to [*342 show if anything he has or knows to say for himself why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such Court such serjeant-at-mace return and certify such other person in whose hands such sum of money is or has been attached to be warned, according to such custom, to be and appear in the same Court to show such cause, and if such person so warned, being solemnly called at such Court, do not appear, or has not appeared, but makes or has made default, then it is, and from time immemorial it has been, used and accustomed for such Court to award such plaintiff to have execution of such sum so attached to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the Court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant, within a year and a day thence next ensuing, come or has come into

the Court so holden and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that after such pledges found and execution had of such sums so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached, or is or has been discharged, against such defendant, of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such defendant; and if such sum of money so attached and defended, and had in execution, amount not, nor has amounted, *343] to *the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said Court, is and, from time immemorial, has been used and accustomed to have process against such defendant, according to such custom, for the residue of his debt by him in such plaint demanded. That the said custom, and all other customs of the said city obtained and used in the same city during all the time aforesaid, were, by authority of a parliament holden in the seventh year of the reign of his Majesty Richard II., King of England, and by divers other statutes, ratified and confirmed to the then mayor and commonalty of the said city, and their successors. And the defendants say, that S. Buckmaster and R. Addams, trading as W. Buckmaster and Co., before the commencement of this action, to wit, on the 17th September, 1860, in their own proper person, came into the Court of our Sovereign lady the Queen, then before the mayor and aldermen of the said city of London, in the chamber of the Guildhall of and within the said city, according to such custom, the said chamber then and still being in and parcel of the said Guildhall, and then and there affirmed a certain plaint against R. Farquharson, in a plea of debt on demand for 160*l.*, &c., and there appointed in their stead G. Ashley their attorney, against the said R. Farquharson, in the plea of the said plaint, according to such custom, and it was granted to him, &c.; whereupon, at the petition of the said S. Buckmaster and R. Addams then and there made to such Court by their said attorney, and by virtue of such plaint, it was then and there commanded by the said Court to C. Fitch, then being one of the serjeants-at-mace of the said mayor, and a minister of such Court, that he, according to such custom, should summon the said S. Farquharson, to appear at the same court so holden before the mayor and aldermen of the said city, *344] to answer the said S. Buckmaster and the said R. Addams *in the plea in such plaint specified; and that such serjeant-at-mace should return and certify what he should do by virtue of the said precept. That afterwards, at the same Court, the serjeant-at-mace, according to such custom, returned and certified to the same Court that the said R. Farquharson had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same; and thereupon the said R. Farquharson was then and there at the same Court solemnly called, and did not appear, but made default. That thereupon, afterwards and before the com-

mencement of this action, to wit, on the 17th September last mentioned, at the same Court, it was alleged by the said S. Buckmaster and R. Addams, by their said attorney, that the now plaintiffs owed to the said R. Farquharson 86*l.* 3*s.* in moneys numbered as the proper moneys of the said R. Farquharson, and then had and detained the same in their hands and custody. Thereupon the said S. Buckmaster and R. Addams, by their said attorney, then and there prayed process, according to such custom, to attach the said R. Farquharson by the said 86*l.* 3*s.* being in the hands and custody of the now plaintiffs, so that the said R. Farquharson might appear at the next such Court to be held before the mayor and aldermen of the said city, in the chamber of the Guildhall of and in the said city, to answer the said S. Buckmaster and R. Addams in the plea in such plaint specified. Whereupon, at their said petition, it was then and there commanded by such Court, before the commencement of this action, to the said serjeant-at-mace and minister of the said Court, that he, according to such custom, should attach the said R. Farquharson by the said 86*l.* 3*s.* so being in the hands and custody of the now plaintiffs as aforesaid, and the same in their hands and custody defend and keep according to such custom, so that the said R. Farquharson might appear at the then next such Court to be holden *before the [345 mayor and aldermen of the said city, &c., according to such custom, to answer the said S. Buckmaster and R. Addams in the plea in the said plaint specified; and that the said serjeant-at-mace, &c., should then return and certify to such Court what he should do by virtue of that precept; and the same day was given to the said S. Buckmaster and R. Addams. That afterwards, and before the commencement of this suit, to wit, the 5th October, in the year aforesaid, they, the now plaintiffs, *being then found within the said city, and within the jurisdiction of the said Court*, were then and there duly warned, according to the said custom, by the said serjeant-at-mace, &c., not to part with the said sum of 86*l.* 3*s.* without the license of the said Court, but the same in their hands and custody safely to keep, so that the said R. Farquharson might be attached thereby, that he might appear at the said Court to answer the said S. Buckmaster and R. Addams in the plea in the said plaint specified. That thereupon the said serjeant-at-mace duly attached the said R. Farquharson by the said sum of 86*l.* 3*s.* That afterwards, to wit, at the said then next Court holden before the said mayor and aldermen of the said city, in the said chamber of Guildhall of the said city, on the 6th October last aforesaid, the said serjeant-at-mace returned and certified to the same Court that he, by virtue of the said precept, had theretofore, to wit, on the 5th October, in the year last aforesaid, attached the said R. Farquharson by the said 86*l.* 3*s.* so being in the hands of and custody of the now plaintiffs, and the same had defended and kept in their hands and custody according to such custom, so that the said R. Farquharson might appear at the said Court so holden on the said 6th October, in the year aforesaid, to answer the said S. Buckmaster and R. Addams in the said plea in their said plaint specified. That thereupon the said R. Farquharson at the same Court was solemnly called, but did not appear, but then *made a first default, which said first [346 default at the same Court was recorded according to such cus-

tom. That thereupon, according to such custom, a further day was then given by the same Court to the said R. Farquharson to appear at the then next Court to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on the 8th October. That thereupon the said R. Farquharson was solemnly called, but did not appear, but then made a second default, which said second default at the same Court was recorded according to custom. That thereupon, according to such custom, a further day was then given by the same Court to the said R. Farquharson to appear at the next such Court to be holden before the mayor and aldermen as aforesaid. That thereupon the said R. Farquharson was solemnly called, but did not appear, but then made a third default, which said third default was duly recorded according to such custom; and thereupon, according to such custom, a further day was then given by the same Court to the said R. Farquharson to appear as aforesaid. That thereupon the said R. Farquharson was solemnly called, but did not appear, but then made a fourth default, which said fourth default was duly recorded according to such custom. That thereupon, afterwards, and after the said four defaults had been recorded as aforesaid by the same Court against the said R. Farquharson in the plea aforesaid, according to such custom, the said S. Buckmaster and R. Addams having appeared at each and every of such Courts so held as aforesaid, by their said attorney, then at the same Court prayed process, according to such custom, to warn the now plaintiffs, the garnishees, to be and appear in the same Court to be holden on the 31st October then instant, to show cause why the said S. Buckmaster and R. Addams should not have execution of the said 86*l.* 3*s.* so attached in their hands and custody. That thereupon, at such Court as *aforesaid, at the *347] petition of the said S. Buckmaster and R. Addams made in such Court, it was commanded by the said Court to the said serjeant-at-mace, that he, according to such custom, should warn and make known to the now plaintiffs, being the garnishees, to be and appear in such Court to be so as aforesaid holden on the 31st October then instant, to show cause why the said S. Buckmaster and R. Addams should not have execution of the said 86*l.* 3*s.* so attached in their hands and custody; and that the said serjeant-at-mace should then return and certify to the same Court what he should have done by virtue of such precept; and the same day was given by the same Court to the said S. Buckmaster and R. Addams to be there according to such custom. That afterwards, to-wit, on the 25th October aforesaid, they, the now plaintiffs, were, within the said city, duly warned by the said serjeant-at-mace to be and appear at such Court, to be as aforesaid holden on the 31st October, to show cause why they, the said S. Buckmaster and R. Addams, should not have execution of the said sum of 86*l.* 3*s.* That at the said Court holden on the 31st October, in the year last aforesaid, the said S. Buckmaster and R. Addams, by their said attorney, appeared and the said serjeant-at-mace then returned and certified to the same Court that he, by virtue of such precept to him directed according to such custom, had warned and made known to the now plaintiffs, the garnishees, to be and appear at the same Court to show such cause; and thereupon, at the same Court the now plaintiffs, the garnishees in such attachments, were solemnly

called, according to such custom, and appeared, and appointed in their stead C. Oxton their attorney, and had leave to imparl, &c., until, &c. And the defendants say that the garnishment against the plaintiffs, and the warning of them, and appearance by them, in the declaration alleged, were and are the said garnishment, warning, and appearance in this plea set out, *and no other, and by means whereof the said Court before the mayor and aldermen aforesaid had jurisdiction over the said plaint and proceedings, and over the said garnishment, and over the plaintiffs in this action, as garnishees, and over the said R. Farquharson.

Demurrer and joinder therein.

Replication:—That the said custom in the said plea mentioned does not extend to, or authorize or give jurisdiction to the said Court of the said mayor and aldermen over any plaint of debt to be levied or affirmed, or levied or affirmed, by a person or persons who at the time of the levying or affirming thereof does or do not reside, dwell, or carry on business within the said city of London or the liberties thereof; or where, at the time of the levying or affirming of the plaint, the defendant or defendants in such plaint mentioned shall not reside, dwell, or carry on business in the said city of London or the liberties thereof; nor where the debt or cause of action in the plaint mentioned shall not have been contracted, or shall not have accrued, within the said city of London or the liberties thereof; and that the said custom does not extend to or authorize the plaintiff named in a plaint to testify and allege, by word of mouth, to the same mayor and aldermen, that any other person, for any cause whatsoever, is indebted to such defendant in such plaint mentioned in any sum of money amounting to the debt in the plaint specified, or part thereof; nor the same Court to command the serjeant-at-mace and minister to attach the defendant in such plaint named by such sum being in the hands or custody of such other person, where such other person does not at the time of such testification or allegation, and of such command to the said serjeant-at-mace and minister, reside, dwell, or carry on business within the said city of London or the liberties thereof; nor where the debt or cause of action so testified or alleged against such other person *has not arisen or accrued within the said city of London or the liberties thereof; and the said custom does not give jurisdiction to the said Court of the mayor and aldermen aforesaid to attach, as in the said plea mentioned, a person who does not, at the time of the testification or allegation and command aforesaid, reside, dwell, or carry on business within the said city of London or the liberties thereof; nor where the debt or cause of action so testified and alleged against such other person has not arisen or accrued within the said city or the liberties thereof.

Demurrer and joinder therein.(a)

Montagu Chambers (*Griffiths* with him) argued for the plaintiffs.(b)
—The plea is bad. It alleges a custom by which the Lord Mayor's

(a) The defendants also rejoined that the custom is and immemorially has been as alleged in the plea, upon which the plaintiffs took issue, and on the 20th of November Russell Gurney, Esq., Recorder of London, came into Court and certified the custom as alleged in the plea.

(b) In last Michaelmas Term. Nov. 20 and 22. Before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

Court assumes jurisdiction in respect of debts contracted without the city of London by persons not resident or carrying on business within the city. Such a custom is void in law. In the preface to Bohun's *Privilegia Londini*, reference is made to the ancient charters granted to the citizens of London, the earliest of which was in the reign of William the Conqueror. The charter granted in the 15 Car. 2 was merely a confirmation of the liberties and privileges of the citizens of London. The custom, as described in the *Liber Albus*(a) of the *350] city of London, is confined to goods or debts *within the city*. In a case of *Bowser v. Collins* (22 Edw. 4, pl. 11 [B.]), Sterkey, Recorder of London, certified the custom as follows:—"That if a plaint be affirmed in London before, &c., against any person, and it be returned 'nihil,' if the plaintiff can surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him to warn him to come in and answer whether he be indebted in the manner alleged by the other, and if he comes in and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff." Pulling's *Customs of London*, p. 188. Therefore the custom as alleged in the plea does exist. But assuming that it does, it is a custom that a particular class of persons shall, through the instrumentality of an inferior court, have jurisdiction over all other persons. In *Bac. Abridg. tit. Customs, (C)*, it is said that "every custom which *351] appears to have been unreasonable in itself, as being against the good of the commonwealth or injurious to a multitude, though beneficial to a particular person, &c., is void, nor can any continuance of such a custom give it sanction, or make that good which was void in its creation." The custom here set up is injurious to a vast multitude, because proceedings may be taken against persons without their knowledge, not only whilst they are in this country, but even whilst they are abroad. In order to give the Court jurisdiction, the garnishee or the goods must be within the city of London at the time of the attachment. In *Andrews v. Clerke, Carth. 25*,

(a) The *Liber Albus* of the City of London was compiled, in the year 1419, by John Carpenter, Common Clerk, and Richard Whittington, Mayor. In page 183 of the translation, edited by H. T. Riley, and published in the year 1861, the custom (so far as material to the present case) is described as follows:—

"Item, when plaint of debt is made before one of the said sheriffs and it is testified by the officer that the defendant has not sufficient assets in the city, and allegation is made by the plaintiff that the defendant has goods and chattels, or debts in other hands or in other keeping within the said city; and it is prayed by the said plaintiff that such goods and chattels may be arrested and the debts stopped; then, at the suit and suggestion of such plaintiff, such goods and chattels whenever they may be found within the city, shall be arrested, and the debts stopped in the hands of the debtors, at peril of the plaintiff.

"And upon this the plaintiff shall continue his suit at four Courts before the same sheriff before whom the plaint was first alleged, until such time as the defendant shall have been four times demanded; and if the defendant does not appear at the fourth Court, and makes four defaults, then the defaulter's goods and chattels, so arrested, shall be appraised and delivered to the plaintiff; and if the goods be not of the same value as the debt, then the debts stopped in the hands of the debtors shall be levied and delivered to the said plaintiff, up to the amount in demand, and such arrests of goods and stoppages of moneys are called 'Foreign Attachments,' according to the custom of the city," &c.

the garnishee pleaded that the debt due from him to the defendant, and the contract on which it was founded, arose and was made in the county of Middlesex, and out of the jurisdiction of the Court; but the Court said that was not material, "for it was always the custom in London to attach debts upon bills of exchange, and goldsmith's notes, &c., if the goldsmith who gave the note, or the person to whom the bill is directed *lieth within the city*, without any respect had to the place where the debt was contracted." *Tamm v. Williams*, 8 Doug. 281, s. c. 2 Chit. Rep. 438, is an express authority that the garnishee must reside, or the goods must be, within the city of London. In the notes to *Turbill's Case*, 1 Wms. Saund. 67 b, it is said that if the plea of foreign attachment states the custom to be, "that if any person be or hath been indebted to any other person *within the city*, it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city;" but it is not necessary so to aver the custom; it is enough to state that the garnishee was warned: *Banks v. Self*, 5 Taunt. 234, note (E. C. L. R. vol. 1). In *Vin. Abridg. tit. Customs of London* (K) 3, it is said: "If in bar of an action a foreign attachment is *pleaded, that the custom is, that if any man bring his action [*352 against another for any debt, and upon a return made, that he non est inventus et quod nihil unde, &c., and thereupon surmises that any other is indebted to the defendant in such a sum, and thereupon to pray process to attach the sum in his hands, and to defend, ita quod the defendant appears to answer the plaintiff, and the serjeant returns that he hath attached him to defend the sum in his hands, and the defendant does not appear at four Courts after, &c., that judgment shall be to recover it in his hands, &c., this is no good custom, without a surmise that the stranger who is indebted to the plaintiff is *within the jurisdiction of the Court*; and the return of the serjeant is not sufficient that he hath attached him to defend it in his hands, for perhaps the serjeant intends that he may attach the debt in his hands though he be not within the jurisdiction of the Court, and his return shall not bind the party without an actual surmise thereof by the party himself: *Trin. 11 Car. B. R.*, between Sir Nicholas Halse and Walker, adjudged upon a demurrer, where a foreign attachment in Exeter was pleaded, which was all one with the custom of London, and all customs there confirmed by Parliament in the time of Queen Elizabeth." In *Lord Barrymore v. Taylor*, 1 Esp. 327, Lord Kenyon ruled that the process of foreign attachment was confined to cases where, at the time of the attachment, the parties were resident in London. *Crosby v. Hetherington*, 4 Man. & G. 933 (E. C. L. R. vol. 43), decided that a plea of payment under a foreign attachment must state that the garnishee, at the time of the attachment, was within the city of London. Moreover, the cause of action must have arisen within the jurisdiction: *De Haber v. The Queen of Portugal*, 17 Q. B. 171, 213 (E. C. L. R. vol. 79). There Lord *Camp- [*358 bell, in delivering the judgment of the Court, said:—"The circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied upon. Nevertheless, after the strong assertions at the bar that this is immaterial where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process

of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the Court from which it issues. The garnishee is safe by paying under the judgment of the Court; but the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail." *Westoby v. Day*, 2 E. & B. 605 (E. C. L. R. vol. 75), is an authority to the same effect.

Sir *F. Kelly* (*C. Pollock* with him), for the defendants.—The question is whether the custom is void on the ground that it is unreasonable and repugnant to every principle of law. If so, it must be either because the creditor or the debtor or the garnishee reside out of the jurisdiction of the Lord Mayor's Court, or because the debt did not arise within it. Where a cause of action arises within the jurisdiction of an inferior Court, it may entertain the plaint, although the parties reside out of the jurisdiction. Again, there is nothing to prevent a party who resides within the jurisdiction of an inferior Court, from suing another who resides without the jurisdiction; or to prevent a party who resides without the jurisdiction from suing a party who resides within it. The circumstance that the cause of action arose and the parties reside out of the jurisdiction of the Lord Mayor's Court *354] does not render the custom *repugnant to any principle of law, for the superior Courts pronounce judgment in cases where the cause of action arose and the parties reside abroad. [BRAMWELL, B.—The power of the superior Courts to attach debts, owing from a garnishee to a judgment-debtor, is expressly limited to cases where the garnishee is within the jurisdiction: 17 & 18 Vict. c. 125, s. 61.] Suppose an Austrian contracted a debt with a Frenchman in Spain, if the Austrian happened to be in England for an hour, and was served with process, this Court might compel payment of the debt. In *Lewis v. Masters*, 5 Mod. 76, Holt, C. J., said "It is one thing if a custom be different from the law, and another thing if it be repugnant to it and unreasonable." It is not unreasonable that the Lord Mayor's Court should enforce payment of debts because they were contracted without the city of London. No doubt, cases of partial inconvenience may arise, but they cannot affect an immemorial custom. A translation of the writ and certificate of Sterkey, Recorder, is given in *Brandon on Foreign Attachment*, App. 211, from which it appears that it is not necessary that the garnishee should reside within the city of London. Confusion has arisen in some of the cases from not distinguishing between the residence of the garnishee in the city and his being within it at the time he is served with the attachment. In *Tamm v. Williams*, 3 Doug. 281, s. c. 2 Chit. Rep. 438, and *Lord Barrymore v. Taylor*, 1 Esp. 327, the custom was not directly pleaded or before the Court. In *De Haber v. The Queen of Portugal*, 17 Q. B. 171 (E. C. L. R. vol. 79), the question was whether property belonging to a foreign sovereign prince in his public capacity, *355] could be attached in the hands of garnishees in *London to compel an appearance in a suit instituted against him on a cause of action arising here. The case of *Halse v. Walker*, as stated in *Viner's Abridg. tit. Customs of London* (K) pl. 3, is at variance with other decisions, if it be taken as deciding anything more than that the garnishee must be within the city of London when the

attachment is served. The expressions of the Court in *Westoby v. Day*, 2 E. & B. 605 (E. L. C. R. vol. 75), so far as regards the present question, are mere obiter dicta. [WILDE, B.—All that the Court there laid down was that, in an action against a garnishee, it is not necessary for him, in pleading payment under a foreign attachment, to show that the cause of action arose within the city of London.] *Harrington v. Macmorris*, 5 Taunt. 228, decided that in a foreign attachment it is not necessary that the debt should arise or the defendant reside within the jurisdiction. In *Banks v. Self*, Id. 234, note, the custom was pleaded, but the plea did not aver that the cause of action arose within the city of London; the Court, however, observed that the uniform course of pleading had been so ever since the time of the Year Books in Edward the Fourth's time, and it was too much to ask them to overthrow so uniform a practice without citing so much as a single applicable case in favour of that request. In *Magrath v. Hardy*, 6 Scott 627, it was held that the custom does not require that any notice of the proceedings should be given to the defendant in the Lord Mayor's Court. *Crosby v. Hetherington*, 4 M. & G. 933 (E. L. C. R. vol. 48), is an authority that it is only necessary that the defendant should be within the city of London at the time the attachment is served.

Montagu Chambers, in reply, cited Bac. Abridg. tit. *Customs of London* (H.), Black. Com., vol. 1, p. 74, *The City of London Case*, 8 Rep. 383, Viner's Abridg. tit. *Customs* (I), pl. 10, *(I 2), pl. 13, [*356 *Rowles v. Mason*, 2 Brownl. 87, *Regina v. The Mayor of London*, 13 Q. B. 1, *Stannian v. Davis*, 1 Salk. 404, *Huxham v. Smith*, 2 Camp. 19, *Anonymous*, 2 Show. 374, *Trevor v. Wall*, 1 T. R. 151, *Harwood v. Lee*, 2 Dyer 196. *Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—The question in this case arises on demurrer. The defendants have pleaded to the plaintiffs' declaration in prohibition, and the plaintiffs have demurred to the plea, thereby confessing its truth, and denying its validity in point of law. We have, therefore, nothing to do with the certificate, not of the learned and respected recorder, but of the mayor and aldermen of London, by his mouth. That certificate would be under consideration if the truth of the plea were in issue, which on the argument of the demurrer it is not.

The question then is, is the custom set forth in the plea valid in law, assuming it to exist in fact? Now, that custom is thus stated:—London is an ancient city; immemorially in it has been a Court, confessedly a local Court, with a local jurisdiction, and no more in any respect except as to the matter in question. So that, if any ordinary action is brought in the Court by a plaintiff against a defendant to recover a debt due from one to the other, the cause of action must arise within the jurisdiction, and the defendant ordinarily must have notice of the action by service of process upon him. But besides this, the ordinary jurisdiction of a local Court, there is claimed for this Court a further power, viz., that if a plaintiff sues a defendant, and if some third person, who is indebted to the *defendant, is [*357 found within the jurisdiction, then, though the plaintiff's cause of action against the defendant did not arise in the city; though neither of them is in any sense a citizen, or resident in the city; and

though the debt of the third person in no way arose in the city; and though that person is in no sense a citizen or resident in the city; though his visit there is casual, or he is only passing through it, "being found there," then, without any notice or attempt at notice to the defendant by any one, the debt due from the third person to the defendant may be *attached* in that person's hand. Thus, any one owing money to another, if he casually enter the city, is subject, first, to a warning to pay, though his creditor has not sued him or desired payment, and, on his next visit, to an execution for the amount of the debt he owes, which amount is handed over to the person suing his creditor, without any proof of his debt (his swearing to it is no necessary part of the custom), on giving a pledge to restore it to such creditor if he appears within a year and a day and *disproves* the debt.

It seems unnecessary to do more than state this custom to show its invalidity. It seems to violate every principle of justice, and every rational rule of jurisprudence and procedure. For it is impossible to suppose that this local Court, like other local Courts, has jurisdiction, in ordinary cases of actions brought in it, only where the cause of action arose within the jurisdiction, yet that when its extraordinary procedure is resorted to (which, indeed, is in theory only in aid of the ordinary, and to compel the defendant to appear), its jurisdiction is practically without limit as to locality; that if the defendant should appear after the attachment, the suit may be defeated by the cause of action not arising within the jurisdiction, while if the proceeding can be carried through without his knowledge, that matter is unimportant. Such a jurisdiction as claimed is repugnant to the very idea of a local *358] Court. Such a Court is, by its name, and in good sense, a Court for a *locality* and the inhabitants thereof, and those who have dealings within it, and with reason.

In holding this plea bad, we neither overrule nor dissent from any former decision, for in no previous instance has the custom here stated been brought before any Court by plea or certificate, and held to be good. The superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions; and unless they are found consonant to reason, and in harmony with the principles of law, they have always been rejected as illegal. Various instances of customs regulating the proceedings of local Courts having been so dealt with, are to be found collected in *Bac. Ab. tit. Customs*, in the latter part of the division, letter (C).

Judgment for the plaintiffs.

SHEEN v. BUMPSTEAD. June 7.

In an action for fraudulently representing that a trader was trustworthy, the defendant proposed to ask a witness what was the reputation of the trader on a certain day, as to his trustworthiness.—Held, that the question was admissible: Per Pollock, C. B., and Martin, B.—Bramwell, B., dissentiente.

THE first count of the declaration stated, that the defendant fraudulently, and with the intent that one Charles Watson might obtain goods upon credit, represented to the plaintiff that the said Charles

Watson was, to the best of his (the defendant's) knowledge, trustworthy; whereas the said Charles Watson was not then trustworthy, as the defendant then well knew; and the defendant by so representing as aforesaid induced the plaintiff to sell and deliver to the said Charles Watson goods on credit: whereby the plaintiff lost the price of the said goods, and incurred expense in endeavouring to recover the same.—Second count: that the defendant fraudulently represented to the plaintiff that the said Charles Watson was in good circumstances and might safely be trusted with goods on credit; whereas the said *Charles Watson was not then in good circumstances, and could not then safely be trusted with goods on credit, as [*359 the defendant then well knew; and the defendant by then so representing as aforesaid, induced the plaintiff to sell and deliver to the said Charles Watson goods on credit: whereby the plaintiff lost the price of the said goods, &c.

Plea.—Not guilty.—Issue thereon.

At the trial, before Martin, B., at the Norwich Spring Assizes, there was evidence (a) that the plaintiff had been induced to trust Watson with goods to the amount of 41*l.* 8*s.* 5*d.*, by means of the following letter written by the defendant to the plaintiff, in answer to one from the plaintiff to him, in which the plaintiff inquired as to Watson's credit:—

"Sir.—In reply respecting Mr. Watson, to the best of my knowledge he is trustworthy. I have knowing (b) him in Business here these 14 years he do (b) with many of the London Houses that I do; he also do business with Mr. Church of your Town, of whom you can here (b) his opinion. "Yours resp.

"ROBERT BUMPSTEAD. Oct. 24/60."

To establish that the defendant knew that Watson was not trustworthy at the time mentioned, the plaintiff put in evidence, along with other matters, an examination of the defendant taken on oath in the matter of the bankruptcy of the said Watson, who in fact had become a bankrupt after the delivery of the goods; from which the jury was called on by the plaintiff to conclude that at the very time the defendant wrote to the plaintiff the letter of the 24th October, 1860, and in the same year, both before and afterwards, *he [*360 had bought goods of Watson to a considerable amount, at 25*l.* per cent. under cost price.

In answer to the plaintiff's case, the defendant gave his explanation of his dealings with Watson, and also called one Alfred Adams, who said:—"I am the counterman to defendant. I have been in his service four years or thereabouts. I have been acquainted with the trade of a grocer 16 years. I went on one occasion to Watson's to look at goods. It was in October, 1860, I believe. It was to examine a parcel of cheese and ascertain whether they were worth the money Watson had asked for them. They were not worth the money which was asked. I refused to take them at the price asked. I bought them for the defendant. I refused to take them at the price he asked, 75 per cent. I bought them at 70/ per hundredweight.

(a) The following is the statement of the facts agreed upon by counsel on appeal to the Court of Exchequer Chamber.

(b) Sic.

This was the full value, I believe. I believe money was lost by the transaction. I know the price given by the defendant for the other goods. The defendant always consulted me as to the purchases. In my opinion he always paid Watson the full market value. He could have bought as cheap elsewhere. All the transactions with Watson came within my knowledge." He was then asked, "*Was Watson, on the 24th October, 1860, trustworthy to your belief?*" This question was objected to by the counsel for the plaintiff, but admitted by the learned Judge. The answer to it was, "I believe he was trustworthy at the time."

The defendant also called one John Fenn, who said:—"I am a tallow-chandler, at Yarmouth, in a large way of business. I know Watson. I knew him in October, 1860. I had dealings with him in 1860. My dealings were not more than 20*l.* a year. He paid me from deal to deal." He was then asked, "*What was the reputation of Watson in October, 1860, as to his trustworthiness as a tradesman?*"

*361] *This question was also objected to by the plaintiff's counsel, but admitted. The answer was:—"It was good: this is my belief."

The defendant also called Richard Tanbridge, George Pulford, and William Hacon, tradesmen of Yarmouth, to whom, severally, the same question was put as had been put to the witness John Fenn and objected to. The like objection, as in Fenn's case, was taken in each case and overruled. The answer of Tanbridge was:—"I considered him perfectly safe." The answer of Pulford was:—"I know nothing to the contrary, but that he was a trustworthy, straightforward, and honest man." The answer of Hacon was:—"His reputation was very good at that time."

The said answers were left with other matters to the jury as evidence for their consideration, and they returned a verdict for the defendant.

O'Malley, in the following Term (April 23), obtained a rule nisi for a new trial, on the ground of the improper reception of the evidence; against which

Bulwer and *Cherry* showed cause in last Easter Term (May 12).—The question whether the evidence was admissible depends on the issue raised by the pleadings. Now, in order to maintain this action, the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation, or to have made the representation fraudulently, without belief that it was true: *Smith's Lead. Cas.*, vol. 1, p. 161, 5th ed.; *Chandelor v. Lopus*, Cro. Jac. 4; *Pasley v. Freeman*, 3 T. R. 51. In that respect there is a distinction between the action for a false representation and an action upon a warranty, in which the gist of the action is the breach of warranty. Therefore in this case the issue was whether the defendant, *knowing* *362] that Watson was *not trustworthy or in good circumstances, *fraudulently represented* that he was; and the evidence was admissible for the purpose of showing that the defendant acted *bonâ fide* and under a reasonable belief that the representations which he made were true: *Shrewsbury v. Blount*, 2 Man. & G. 475 (E. C. L. R. vol. 40). [POLLOCK, C. B.—The foundation of the action is fraud, and if the defendant truly stated what he believed to be true the

action will not lie. MARTIN, B.—Suppose this case had been tried before the alteration of the law which allowed the parties to a suit to be witnesses, what other evidence of bona fides could the defendant have given?] The defendant was not bound to prove that the representations were in fact true, but only that they were made under a reasonable and well-grounded belief that they were true: *Haycraft v. Creasy*, 2 East 92. Reputation is evidence to prove a man's character, for it is the general conclusion formed by society: *Starkie on Evidence*, p. 43, 46. In *Gurr v. Rutton*, Holt, N. P. 327 (E. C. L. R. vol. 3), Gibbs, C. J., said:—"Now, what is reputation of ownership? It is made up of the opinions of a man's neighbours; it is a number of voices, as it were, concurring upon one or other of two facts." That definition was cited with approbation by Dallas, C. J., in *Oliver v. Bartlett*, 1 B. & B. 269 (E. C. L. R. vol. 5).

Keane (O'Malley with him), in support of the rule.—The evidence was not admissible. The question was whether the defendant made the representation fraudulently and with intent to deceive the plaintiff, and the opinion of a third person as to the credit of Watson cannot be evidence that the defendant when he made the representation bona fide believed it to be true. If that third person had communicated his opinion to the defendant, and he had acted upon it, believing it to be true, the case might have been *different; [*363 but because a third person says that he believed Watson was trustworthy the jury are called upon to conclude that the defendant believed him to be so. *Shrewsbury v. Blount*, 2 M. & G. 475 (E. C. L. R. vol. 40), was an action by A. against B., C. and D. for false representations alleged to have been made by them acting as directors of a joint stock company, and it was ruled that conversations between B. and C., and conversations between C. and E., a former agent of the company, were admissible, not as evidence of the facts, but for the purpose of showing the bona fides of the defendants in making such representations. If the defendant had pleaded, as in *Evans v. Collins*, 5 Q. B. 804 (E. C. L. R. vol. 48), that at the time he made the representation he had good and probable cause to believe, and that he did with good faith believe it to be true, this evidence would not have been admissible in support of that allegation. General reputation is only admissible in questions where conclusive evidence cannot be obtained, as in questions of pedigree, or right of way. *Oliver v. Bartlett* was a question of reputed ownership. [POLLOCK, C. B., referred to *Polhill v. Walter*, 3 B. & Adol. 114 (E. C. L. R. vol. 23).] The defendant ought to have given evidence of his knowledge of the trustworthiness of Watson at the time he made the representation, not of the opinion of other persons. Such evidence is no more admissible than if, in an action for false imprisonment with a plea of justification on the ground that the plaintiff committed felony, the defendant should propose to call a number of witnesses to state that they believed him innocent.

Cur. adv. vult.

The Court having differed in opinion, the following judgments were now delivered.

*BRAMWELL, B.—I think this rule should be made absolute. [*364 The plaintiff alleged that the defendant had stated, "that to the best of his knowledge one Watson was trustworthy;" that that repre-

sentation was untrue, and untrue to the defendant's knowledge. These allegations the defendant denied; the only admissible evidence, then, is such as goes to prove or to disprove them or any of them. A question was put to a witness, which was *not* "what was the general opinion as to Watson's trustworthiness?" nor "what was the belief of the tradesmen in the town thereon?" I will assume such questions would have been admissible on one or both of two grounds, viz., first, that the defendant had made a representation as to such general opinion; second, that the defendant might be assumed to be aware of and participate in such general opinion, and so *bonâ fide* make the statement he has made. But that was *not* the question; the question was, "Was Watson, on the 24th October, 1860, trustworthy to your belief?" That question was objected to, but allowed, and, as I think, erroneously. It is obvious that it does not go directly to prove or disprove any of the controverted allegations. Though the witness did on the 24th of October, 1860, believe Watson to be trustworthy, he may not have been so, and the defendant may have stated what he did, stated it untruly, and untruly to his knowledge. But it is said the question was admissible because it might be submitted to the jury that that which was the knowledge and belief of *the tradesmen in the town*, was the knowledge and belief of the defendant. But, as I have said, the question was not "what was the knowledge and belief of the tradesmen in the town;" but what was the belief of the witness. It is true that several of the tradesmen were called, and, if enough were, it may be that it would be reasonable to infer that their opinion was the common opinion; and if all the tradesmen had been called, the *365] common opinion *would have been proved in the most conclusive way. But the question must be proper when put and allowed, and cannot become so or not according as a sufficient number of witnesses is or is not called. The mistake, as I think it, seems to me the same as where, on the question what is the fair price of a piece of land, an inquiry is proposed as to the price at which a piece of neighbouring land similarly circumstanced sold, or where the question is, what is the fair price of wheat on such a day, and it is asked at what price A. then sold such wheat to B. The proper question in each case to the expert is, what is the fair or market price. On cross-examination he may give, as his reason, because such a piece of land was sold at such a price, and because A. sold wheat at such a price to B., and any other reasons; but he cannot be asked those particular questions on the examination in chief. I accept the illustration put. If the plaintiff had proposed to ask one of these tradesmen what was his belief on October 24th as to Watson's trustworthiness, would not the defendant have been entitled to contend that that man's belief was nothing to him unless known to him;—surely, the fallacy is in saying that it is "the knowledge and belief of the tradesmen in the town" or a legitimate mode of proving it.

I think this a question of considerable importance in principle. If such evidence were admissible, collateral issues would be raised at great expense, and with an opportunity for great injustice and dishonesty. For instance, in this case, it may have happened that twenty persons may have been applied to, who had a bad opinion of Watson, and it may be that each of those called, if asked what was the general

opinion on October 24th, might have said either that he did not know or that he had since found out it was unfavourable. In this particular I think it by no means improbable that this evidence unduly weighed with the *jury. I confess with great respect I entertain a strong opinion that the question was objectionable, [*366 equally in point of law and of convenience, and that the rule should be absolute.

MARTIN, B.—This was a motion for a new trial upon the ground of the illegal admission of evidence.

The action was for fraudulent misrepresentation as to the trustworthiness of a person named Watson, and the plea was not guilty. The plaintiff was a cheese factor at Leicester, and the defendant a grocer at Yarmouth; Watson was also a grocer there, and had written to the plaintiff requesting him to supply cheese, and referred to the defendant, who had had dealings with the plaintiff, as to his responsibility. The plaintiff in consequence addressed a letter to the defendant, who wrote an answer dated the 24th October, 1860, *stating that to the best of his knowledge Watson was trustworthy*. This was the alleged fraudulent misrepresentation. The evidence at the trial consisted of this letter, a supply of goods to Watson in consequence, and an examination of the defendant before the Commissioner in the bankruptcy of Watson, in which the defendant stated that he had bought goods from Watson during the year 1860, at 25l. per cent. under the invoice prices; and a purchase of this kind on the 23d October (the day before the letter to the plaintiff was written) was especially relied on. For the defence the defendant himself was examined, and also his shopman, who gave evidence that he was much concerned in the defendant's transactions with Watson, and that he himself had made the purchase on the 23d of October, and the following question was proposed to be asked him, namely, "Was Watson on the 24th October, 1860, trustworthy to your belief?" It was objected to; but I admitted it, and his answer, "I believe he was trustworthy at that time." Four *other tradesmen at Yarmouth were called as witnesses [*367 who had had dealings with Watson, and the same question proposed to them, subject to the same objection; and the point for judgment is, whether it was by law admissible. I think it was.

It was objected, first, that the question was not addressed to the evidence adduced on the part of the plaintiff, that the plaintiff relied upon knowledge possessed by the defendant personally as to the circumstances and dealings of Watson, and that it was immaterial to him what was the knowledge or belief of other persons as to Watson's trustworthiness. I think this objection fails; for in my opinion, the admissibility or non-admissibility of evidence depends upon the issue on the record then being tried, and not upon the evidence which the plaintiff may adduce in support of it.

It was secondly objected that the evidence was not admissible upon the issue, which was whether, on the 24th October, 1860, the defendant fraudulently stated that, to the best of his knowledge, Watson was trustworthy. I apprehend the rule of law upon the subject to be that all facts and circumstances which afford a fair presumption or inference as to the question in dispute, and which may fairly and reasonably aid the jury in arriving at the just and true conclusion,

are admissible, and that the true principle is to extend rather than restrict the admissibility of evidence (1 Starkie on Evidence, p. 76). Suppose the plaintiff had called witnesses such as those called by the defendant, to prove, that upon the 24th October, to their knowledge and belief, Watson, a brother tradesman in the same town, was not trustworthy, would not this have been evidence as against the defendant? I apprehend it would, and that it might fairly and reasonably be submitted *368] to the jury that that which was the knowledge and belief of the *tradesmen in the town as to the trustworthiness of Watson, was the knowledge and belief of the defendant. In my opinion, an inference might fairly and reasonably be drawn from it, not indeed a conclusive one, but that it was a fact or circumstance which might lawfully be laid before the jury as an element to aid in guiding them to a true conclusion upon the question in issue. And if this evidence would have been admissible for the plaintiff, evidence the other way would seem to be clearly admissible for the defendant, not by any means as conclusive, for it might well be that the defendant possessed knowledge which the witnesses did not, and if the jury were satisfied that, notwithstanding the belief of others, the defendant knew or had reason to know that Watson was not trustworthy, they very properly might have found their verdict for the plaintiff. Indeed before parties were admissible as witnesses for themselves, such evidence as that alleged to be inadmissible, might have been the only evidence which a defendant could by possibility adduce. His own mouth would have been closed, and when the question was whether a brother tradesman was to his belief and knowledge trustworthy at a certain time, surely what other tradesmen in the same line of business believed would be evidence to be laid before the jury,—it might be the only evidence possible to be adduced. It is not evidence of opinion in the sense that makes such evidence inadmissible, it is evidence of a fact that at that time Watson was believed to be trustworthy.

I have hitherto considered the question in reference to the evidence of the tradesmen, because, as regards the shopman of the defendant, I think the matter clear. According to his evidence he was cognisant of all the transactions of the defendant with Watson, from which *369] his knowledge as to Watson's solvency was said to be acquired, *and had himself conducted that of the 23d of October. He had therefore the precise means of knowledge which the defendant had. No objection was made to the defendant giving evidence that to his knowledge and belief Watson was trustworthy, and what possible objection can there be to his shopman, who knew all that he did, giving the same evidence? It seems to be conceded that evidence as to the reputation of Watson's state of solvency amongst the tradesmen at Yarmouth would have been admissible; if so, the question objected to would seem to be the first step towards it; for the reputation upon the subject is only the aggregate of the opinion and belief of a number of individuals upon it.

POLLOCK, C. B.—I regret that there should be any difference of opinion upon the subject. The question was: "Was Watson trustworthy to your belief?" And it appears to me that the term "trustworthy" for the purpose of this inquiry does not mean a *fact*, that is, that the party was able to pay his debts, but it means *credit*. In

speaking of a person of good credit the expression does not mean that he is solvent, but that he has credit, and that his reputation is such that people trust him. I think the question means in substance and fact this: "According to your opinion, was Watson in good credit at that time?" And I think this was admissible according to my brother Bramwell's view of the law.

I therefore agree with my brother Martin, and the rule must be discharged.
Rule discharged.

*TAYLOR, Appellant, and ORAM and Another, Respondents. [*370
June 9.

On an information under the 23 & 24 Vict. c. 27, for keeping a house "for public refreshment, resort, and entertainment," the evidence was that the defendants kept a dancing saloon. The entrance from the street led to a room fitted with chairs, looking-glasses, and a number of shelves holding glasses, measures, and pots. This room opened into the dancing-room. When the house was visited by the police, one of the defendants was behind a counter at the entrance of the dancing-room pouring beer from one jug into another. A number of persons were in the room, some dancing, some drinking beer; men were sitting at a table, drinking and singing; and there were a number of quarts of beer in persons' hands, from which glasses were filled and handed to others. No sale of anything was seen. Threepence was charged for admission, and if a pot of beer was wanted, the persons paid sixpence first and one of the defendants went for it. The magistrate, before whom the information was laid, was of opinion that there was no sufficient evidence that it was a house kept open for "public refreshment and entertainment," conceiving that the word "entertainment" meant not diversion or amusement, but the provision of food, drink, and whatever might be reasonably required for the personal comfort of guests.—Held, that the finding of the magistrate was conclusive: *Per totam Curiam*.

That the magistrate's construction of the word entertainment was correct: *Per Pollock, C. B.* That the evidence was sufficient to support a conviction: *Per Martin, B.* That the decision of the magistrate was correct in law and fact: *Per Bramwell, B.*

PURSUANT to the 20 & 21 Vict. c. 43, the following case was stated for the opinion of this Court, by a stipendiary magistrate for the borough of Cardiff:—

This was an information, prosecuted by order of the Commissioners of Inland Revenue, which charged the respondents, under the 9th section of the 23 Vict. c. 27, with having, on the 7th, 10th, and 17th days of December, 1861, kept a refreshment-house without a license.

The evidence for the prosecution was as follows:—

John Lynn said:—I am an inspector of police in this borough. I know No. 30, Bute Street, it is a dancing saloon; the entrance is by an outside passage from the street; at the end of this passage is a small partition to screen a door, round that is a door and an entrance to a small room; in this room is a fire-place, and it is fitted with chairs, looking-glasses, and a number of shelves, holding glasses, measures, and pots; from this room a door leads to a larger room, the dancing-room, which is fitted up with forms all round. When I visited the house in December last, there was a counter on the left-hand side of the entrance of this large room, and further in the room a large table with seats on both sides of it, at the bottom was a place for musicians. On the 17th of December last I went into the [*371 house at half-past eleven at night. I went into the little room, several persons were there; Oram was behind the counter pouring

beer from one jug into another. I went into the dancing-room and found men and women dancing, sixty or seventy persons were in the room, some dancing, some standing about, some drinking beer; at the table sat a number of men drinking and singing chorus and lifting their glasses as they sang: they wanted us to drink. I saw a number of quarts of beer in persons' hands. Oram went into the room with me. I saw glasses filled from the quarts and handed to others. Oram is always there: he is one of the managers: he said it was his room. I was also in these rooms on the 10th of December last at a quarter to twelve at night, saw a quart of beer standing on the counter in the small room, Oram was there; dancing was going on, as I described on the last occasion; about sixty or seventy persons were there. I had also been there on the 6th and saw the same thing going on there; it was eleven o'clock when I was there on the 6th. Smart's wife was always there; she took the entrance-money.

Cross-examined by Smart.—I never saw anything sold there. Threepence is charged for admission.

William Price said:—I am a police constable, and was with Mr. Lynn on the 17th of December last. I have heard what he said about these premises; it is true.

Cross-examined by Oram.—I don't know whether the beer was given by you to the persons. I saw drinking. I never saw anything sold there.

William Selby said:—I am a police constable, and know No. 30, Bute Street: visited this saloon nearly every night in December; have seen Smart and his wife take money for admission; have seen a great number of people drinking in the large room and dancing.

Cross-examined.—Never saw anything sold there.

*372] *Oram said in defence, "threepence is charged for admission, and if a pot of beer is wanted they pay sixpence first and one of us goes to fetch it."

Smart said in defence, "no refreshment is sold there."

No evidence was offered for the defendants.

This case depended on the construction of the 6th section of the Act. The first part of the section defines "a refreshment-house" to be "any house, room, shop, or building kept open for public refreshment, resort, and entertainment at any time between the hours of nine (now by a subsequent Act ten) o'clock at night and five o'clock in the morning."

The evidence given in support of the information did not in my opinion bring the house in question within this definition. It was shown, no doubt, to be a place of public resort, of resort for the purpose of dancing; but there was nothing to satisfy the remaining terms of the definition. "Entertainment" I conceived to mean, not diversion or amusement, but the provision of food, drink, and whatever else might be reasonably required for the personal comfort of guests, and of such entertainment there was no sufficient evidence; and I could not say that this was a house kept for public refreshment, inasmuch as no refreshments at all were kept there, only one kind of refreshment was obtainable, and visitors wanting that were dependent upon the chance of being able to procure it from other places.

Then with regard to the remainder of the section, it seems to be

clearly discretionary with the class of persons referred to whether or not they take out licenses under the Act; and I only allude to it here in order to remark that such a license does not authorize the sale of beer or other exciseable liquors. Looking to this circumstance and to the form of license given in the schedule, in which the sale of beer, &c., is expressly excepted from its authority, it seemed to me that a person could not obtain a license under this *Act if beer were the only refreshment offered for sale or consumption by him. [*373] It would follow that where, as in the present case, beer is the only refreshment proved to be consumed in the house, the definition in the first part of the section would not be satisfied; and that the keeper of such a house could not be held liable to the penalties imposed by the Act for doing, without a license, that which he could not be licensed to do.

Upon these grounds I dismissed the information.

Locke (*Welsby* with him), for the appellant.—The question is whether these rooms are a “refreshment-house” within the meaning of the 6th section of the 23 & 24 Vict. c. 27.(a) The first part of that section declares that “all *houses, shops, or buildings, kept [*374] open for public refreshment, resort, and entertainment,” at any time between the hours of nine o'clock at night and five in the morning: not being licensed for the sale of beer, cider, wine, or spirits respectively, “shall be deemed refreshment-houses within that Act.” This is clearly a house for public resort, and it is also a house for public refreshment, since any person may obtain refreshment there. [*BRAMWELL*, B.—Theoretically it is a favour on the part of the defendants to get the beer.] The latter part of the 6th section defines two cases in which a person may take out a license to keep a refreshment-house;

(a) Section 1 imposed certain rates and duties “For every license to keep a refreshment-house.”

“And for every license to be granted as hereinafter mentioned to any licensed keeper of a refreshment-house, to sell therein by retail foreign wine to be consumed in such house, or on the premises belonging thereto.”

“And for every license to be taken out by any person for the selling by retail in any shop of foreign and British wine not to be consumed in the house or shop or on the premises where sold.”

Section 6. “All houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment at any time between the hours of nine of the clock at night and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine, or spirits respectively, shall be deemed refreshment-houses within this Act, and the resident owner, tenant, or occupier thereof shall be required to take out a license under this Act to keep a refreshment-house; and every person who shall keep any house, room, shop, or building for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine, and spirits sold respectively under a proper license in that behalf); and every person who shall keep any house, room, shop, or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a license under this Act to keep a refreshment-house; and in all proceedings and upon all occasions whatever it shall be sufficient to describe by the term refreshment house any house, room, shop, or building in which any such article as aforesaid (except as aforesaid), is sold to be consumed, or is consumed as aforesaid, without further or otherwise designating or describing the same.”

Section 9. “Every person who shall keep a refreshment-house for which a license is required by this Act, without taking out and having in force a proper license in that behalf granted to him under the authority of this Act, shall forfeit a sum not exceeding twenty pounds, which penalty shall be recovered as hereinafter directed.”

By the 24 & 25 Vict. c. 91, ss. 8, 9, the hour of ten is substituted for that of nine in the above Act, and the amount of duties altered.

first, where he shall sell any victual or refreshment to be consumed on the premises where the same shall be sold; and secondly, where he shall keep any house, room, &c., for the consumption therein by the public of any refreshment, although the same shall not be sold therein. These rooms were kept open for public entertainment, and refreshment was consumed on the premises. [CHANNELL, B.—The words are “for public refreshment,” that is, where the public may obtain refreshment as a matter of course.] Any person might obtain a pot of beer upon payment of sixpence in addition to the threepence entrance-money: or he might pay the threepence and bring his own beer; and it cannot be denied that beer constitutes refreshment. It is not necessary that the beer should be sold by the persons who keep *375] the house. These are also rooms for “public *entertainment,” for music and dancing has in all ages and in all countries been considered “entertainment.”

Poland, for the respondents.—To render a license necessary, the house must be kept open for public refreshment, resort, and entertainment. These rooms are not a “refreshment-house” within the meaning of the 23 & 24 Vict. c. 27, which only requires a license where a person keeps a refreshment-house. It is not a house for “public entertainment,” because persons are allowed to drink there; for, if so, every place of amusement where iced water is provided would be a house for “entertainment” within the meaning of the Act. The house is not kept open for the purpose of supplying beer, but for dancing; and from that alone the profit is derived. [MARTIN, B.—It is a question of fact whether this is not in substance a house for refreshment.] If, so, the Court will not review the magistrate’s decision. This is no more a house for entertainment than a room at which billiards are played. To bring the case within the Act, the principal object for which the house is kept open must be the supply of refreshments: *Hall v. Green*, 9 Exch. 247.† By the first branch of the 6th section every person who keeps a refreshment-house is required to take out a license; by the second branch every person who keeps a house for the purpose of selling therein victuals or refreshment to be consumed on the premises; and every person who keeps a house for the consumption therein of refreshment, although not sold therein, *may, if he think fit*, take out a license to keep a refreshment-house. If in a penal action the three questions had been separately left to the jury, whether this was a house for refreshment, resort, and entertainment, and they had found any one of them in the negative, their finding would have been conclusive: *Gregory v. Tavernor*, 6 C. & P. 280 (E. L. C. R. vol. 25). *376] [MARTIN, B.—In such a case the Judge would tell the jury what was in point of law a house “for public refreshment and entertainment.”]

Locke, in reply, referred to *Atkinson v. Sellers*, 5 C. B., N. S. 442 (E. L. C. R. vol. 94).

POLLOCK, C. B.—I am of opinion that the appeal ought to be dismissed. The question turns upon whether this house was a place for “public refreshment, resort, and entertainment,” within the meaning of the 23 & 24 Vict. c. 27; and it must have been for all three, otherwise the case is not within the Act. That it was a place for “public resort,” there can be no doubt. As to whether it was a place for

public refreshment, I give no opinion. I agree with Mr. *Locke* that that part of the magistrate's decision is not satisfactory; but I do not think he was wrong as to the meaning of the word "entertainment." If I found in some other Acts of Parliament that word coupled with the word "refreshment," I should be strongly disposed to think it meant amusement and gratification rather than food or drink. But I agree with my brother Martin that the word "entertainment," as here used, is only another expression for "refreshment," and probably means something more substantial than simple refreshment. The word "entertainment" has unquestionably an ambiguous meaning, and being found in connection with the word "refreshment," I should have thought that if the legislature meant it to signify something not ejusdem generis, but quite different, they would have said, "All houses kept open for public refreshment, resort, and entertainment, such as music, dancing, and other similar entertainment." But, finding the word where it is, I think it means refreshment ejusdem generis.

*The 41st section strongly confirms that view. It enacts, [*377 that "any person who shall be drunk, riotous, quarrelsome, or disorderly in any shop, house, premises, or place licensed for the sale of beer, wine, or spirituous liquors by retail to be consumed on the premises, or for refreshment, resort, and entertainment under the provisions of this Act," &c., shall be liable to a fine. That seems to me nearly decisive of the meaning of the word "entertainment." In construing a penal Act, we ought to take care that it is not extended beyond that which the legislature clearly meant and has adequately expressed. If the word "entertainment" refers to bodily and not mental gratification, whether the magistrate was right or wrong in his finding, he has distinctly found, as a fact, that there was not sufficient evidence to satisfy him that this was a place of entertainment. I am disposed to agree with him, and I think the word "entertainment" means something more than refreshment. Beer may be "refreshment," but it is not "entertainment." However, upon one of the points the magistrate has decided in a manner which is conclusive, and therefore we ought not to send the case back to him; for if he is right upon any one of the three points the appeal ought to be dismissed. It seems to me that he is right in the meaning which he has attached to the word "entertainment," and he has found as a fact that this was not a place of entertainment. That was purely a matter for him to decide; his finding is conclusive and the appeal must be dismissed.

MARTIN, B.—I do not differ, but I own I think this a question of difficulty. If I were called upon to draw a conclusion from the facts stated in this case, I should arrive at the conclusion that these were rooms "kept open for public refreshment, resort, and entertainment." It is not necessary to decide what is the meaning of the word "entertainment," *but my impression is that it means entertainment [*378 in the nature of refreshment. I think that Mr. *Poland* is right in saying that it must be shown that these rooms were "kept open for public refreshment, resort, and entertainment." My mind is not affected by the form of the license, for a keeper of a refreshment-house "to sell any victual or refreshment to be consumed therein; provided that for the sale of any exciseable liquor he shall have in force a

proper license granted to him in that behalf;" because the 6th section says that certain houses shall be deemed refreshment-houses, and therefore the legislature has given a sort of interpretation clause of its meaning. Assuming, as the justice has found, that these were primarily dancing-rooms, and that persons went night after night to these rooms who never danced and were habitually supplied with beer, only one conclusion of fact seems to me to follow, namely, that these were rooms for public refreshment, resort, and entertainment. But we have to determine whether or no the justice was wrong in point of law; for an appeal is only given by reason of the appellant being dissatisfied with the determination of the justice "as being erroneous in point of law." I do not say that it was; and if the question was submitted to another justice, and he arrived at the conclusion that these rooms were kept open not merely for dancing but that persons might go and get beer there, I should say that they were kept open for public refreshment, resort, and entertainment. But, upon the ground that the justice has determined the facts, I concur with the rest of the Court that the appeal should be dismissed.

BRAMWELL, B.—I am of the same opinion. I agree with the magistrate's view of the Act of Parliament; and I think that upon the evidence he came to a right conclusion. For the reasons given *379] by my brother Martin, it is not necessary *to make any distinction between "entertainment" and "refreshment;" and the question is whether the justice ought to have decided that this was a house kept open for "public refreshment" within the meaning of the Act. The 6th section may be thus read:—"The owner, tenant, and occupier of every house kept open for public refreshment between the hours of nine at night and five in the morning is hereby required to take out a license." Then what are the facts? The place in question was a dancing saloon, and a great many people went there; some danced, others did not; some had beer, others had none; some danced and had beer, others had beer and did not dance; but those who wanted beer gave the money to one of the defendants to fetch it. That being so, I am of opinion that this was not a house kept open for "public refreshment," because the statute means a house kept open for the purpose of supplying refreshment to persons, not for the purpose of going and buying it for them. Assuming that the latter purpose did not involve the making any profit, I think that this was not a house kept open for refreshment, if it was merely obtained in the way I have described. I am confirmed in that opinion by the language of the license, because it is for a person who *sells*, and it is impossible to suppose that the legislature meant that, in order to authorize a person to do what he does, he should take out a license to do what he does not do. If, indeed, the proceeding was merely colourable, and there was a bargain between the publican and the defendants by which they were to get a profit on each pot, or by taking a certain quantity of beer, I am not sure that I should not be prepared to hold that the house was kept open for "refreshment and entertainment" within the meaning of the Act; because, though I am *380] inclined to think that by the word "entertainment" the *legislature meant something more than "refreshment," I doubt whether a person could evade the Act by saying, "I refresh to a cer-

tain extent only." However, upon that it is not necessary to express any opinion. I think the magistrate came to a correct conclusion upon the facts and the law as applicable to the facts; and it seems to me that this was not a house kept open for public refreshment. I concur in the sort of negative reasons which the magistrate has given for his decision, namely, that refreshment was not kept there nor sold there, but fetched from a public-house. For these reasons I think the decision right, and that the appeal ought to be dismissed.

CHANNELL, B.—I am also of opinion that the appeal ought to be dismissed. The house in question was clearly kept open for public resort, but that is not enough; it must be shown that it was also kept open for public refreshment and public entertainment. Now, the magistrate has found that it was not kept open for public refreshment or entertainment. It is not necessary to say whether, if I had exercised the functions of the magistrate, I should have come to his conclusion of law or fact; but I do not say that he is wrong. With regard to its not being a house of public entertainment he gives one reason; with regard to its not being a house of public refreshment he gives three reasons; and if the reason he has given why it is not a house of public entertainment be good, or if any one of the three reasons he has given why it is not a house for public refreshment be good, we ought not to allow this appeal. I am disposed to go further, and say we must find upon the facts that the reason for its not being a house for public entertainment, and every one of the three reasons for its not being a house for public refreshment, altogether fail, before we can reverse his decision. But I cannot say that the magistrate was wrong; and that is sufficient to dispose of the case. [*381
Appeal dismissed.

FREDERICKS, Appellant, and HOWIE, Respondent. June 9.

A portable theatre or booth consisting of two caravans or wagons drawn from place to place by horses, and when joined together forming a temporary structure for the performance thereon of stage plays, is not a "tenement" within the meaning of the 2 & 3 Vict. c. 47, s. 46.

PURSUANT to the 20 & 21 Vict. c. 43, the following case was stated for the opinion of this Court by justices of the peace for the county of Essex:—

On the 11th of November, 1861, Daniel Howie, the respondent, who is a superintendent of the Metropolitan Police Force, brought before the justices sitting in petty sessions at Stratford, in the county of Essex, and within the Metropolitan Police District, Frederick Fredericks, the appellant, and then and there informed and charged against the appellant that he had, on the 2d day of November, A. D. 1861, at the parish of Barking, in the county of Essex, and within the Metropolitan Police District, been found performing in a certain tenement used as an unlicensed theatre, contrary to the statute in that case made and provided.

The information or charge arises under the statute 2 & 3 Vict. c. 47, for "further improving the police in and near the Metropolis." The 46th section enacts, "That it shall be lawful for the Commissioners

of Police, by order in writing, to authorize any superintendent belonging to the Metropolitan Police, with such constables as he may think necessary, to enter into any house or room kept or used within the said district for stage plays or dramatic entertainments into which admission is obtained by payment of money, and which is not *382] a licensed theatre, at any time when the same shall be open for the reception of persons resorting thereto, and to take into custody all persons who shall be found therein without lawful excuse; and every person keeping, using, or knowingly letting any house or other tenement for the purpose of being used as an unlicensed theatre shall be liable to a penalty not more than twenty pounds, or, in the discretion of the magistrate, may be committed to the House of Correction, with or without hard labour, for a time not more than two calendar months; and every person performing or being therein without lawful excuse shall be liable to a penalty not more than forty shillings; and a conviction under the Act for this offence shall not exempt the owner, keeper, or manager of any such house, room, or tenement from any penalty or penal consequences to which he may be liable for keeping a disorderly house, or for the nuisance thereby occasioned."

It was contended on behalf of the appellant, as hereinafter mentioned, that the temporary theatre, or building, or booth, hereinafter described, was not a "tenement" within the meaning of that provision.

Daniel Howie was duly authorized by an order in writing of the Commissioners of the Metropolitan Police to enter with such constables as he should think necessary an unlicensed theatre, situate on premises known as the "Peto Arms" at Barking, in the Metropolitan Police District; and with such authority, and accompanied by several constables, he proceeded on the evening of Saturday, the 2d day of November, 1861, at about eight o'clock, to a temporary and portable theatre or booth, hereinafter described, where he saw the said Frederick Fredericks, the appellant, within the said temporary and portable theatre or booth; and the persons who were then on the stage were, together with the said Frederick Fredericks, then and there taken *383] into custody. The said Frederick Fredericks was then and there the owner, keeper, and manager of the said temporary and portable theatre or booth, and the manager of the company of strolling players, who were with others then and there dressed in theatrical costume and acting a stage play or theatrical performance.

It was proved that the said temporary and portable theatre or booth was not a licensed theatre; that it was then and there temporarily placed and situate within the Metropolitan Police District; that it was kept and used by the said Frederick Fredericks as an unlicensed theatre and for stage plays or dramatic entertainment, and into which admission was obtained by payment of money, namely, three pence for each person; that as regards the construction thereof, the said portable and temporary theatre or booth consisted of two caravans or wagons, drawn from place to place by horses, and when the two said caravans or wagons were joined together it formed a temporary structure, in size about twenty yards long by nine yards wide, and above eight yards high; that it had a boarded front as high as the

top, and that the boards on the sides and end reached about two yards high; that the remainder of the sides and end and also the roof were of canvas, supported by poles; that there were several posts in the ground around the outside; that the door through which persons were admitted was of wood; that inside there were seats erected to accommodate about 300 persons, and that there was a stage and a curtain to let down; that the said temporary theatre or booth was put together in the following manner: the said two caravans which stand upon wheels were placed front and back; the stage was formed by two flaps which fall down and form the level floor; the sides and back were formed by uprights and fixed by screw bolts and fastened to the vans; the whole of the materials were portable, capable of being taken to pieces and readjusted; that *it required about [*384 four hours to put it up and two hours and a half to take down; that the materials consisted of the said caravans and materials brought in the said caravans, and taken away in like manner. And upon the whole it appeared to us that it was proved; and we were of opinion that, assuming the said temporary and portable theatre or booth to be a "tenement" within the meaning of the said 46th section above mentioned, the same was such an unlicensed theatre as is mentioned in the said 46th section, and that the appellant was guilty of performing and being therein without lawful excuse.

It was contended, on behalf of the appellant, that the said temporary and portable theatre did not come within the meaning of the said 46th section, on the ground that the same was not a "house or tenement" within the meaning of that section; but we were of opinion that the said temporary and portable theatre or booth did come within the said word "tenement" in such 46th section, and this, together with the facts above stated, as proved, were the grounds of our determination in the case. And we therefore convicted the appellant of the said offence; and did adjudge the said Frederick Fredericks, the elder, to forfeit and pay, the sum of five shillings, together with the costs.

The question of law is, whether the said temporary and portable theatre or booth was or was not a "tenement" within the said 46th section of the said Act of Parliament.

If the opinion of the Court be in the negative, the said conviction should be reversed; if otherwise, the said conviction should be affirmed.

G. Browne, for the respondent.—This portable theatre or booth, was a "tenement" used as an unlicensed theatre, in contravention of the provisions of the 2 & 3 Vict. c. 47, *s. 46, ante, p. 381. [*385 [BRAMWELL, B.—Could it be distrained for rent?] It could not. In *Davys*, appellant, *Douglass*, respondent, 4 H. & N. 180,† the question arose under the 6 & 7 Vict. c. 68. and it was held that a booth theatre which was taken to pieces and carried from place to place for theatrical performances was not a "house, or other place of public resort, for the public performance of stage plays" within the meaning of the 2d section of that Act. But if it could have been proved that the performance was for hire, the conviction might have been supported under the 11th section, for the words "any place not being a patent or duly licensed as a theatre" would include a booth.

The 46th section of the 2 & 3 Vict. c. 47 applies to the same unlicensed theatres as the 11th section of the 6 & 7 Vict. c. 68. [MARTIN, B.—The 38th section(a) contains an express enactment with respect to a “booth, standing, tent, caravan, wagon, &c.,” clearly meaning those things with which persons go about travelling to fairs; then the 46th section authorizes the police “to enter into any *house* or *room* kept or *386] used for stage *plays,” and it imposes a penalty on every person keeping “any *house* or other *tenement*” for the purpose of being used as an unlicensed theatre. Contrasting the two sections, it is evident that the word “tenement” means something different and of a more permanent character than a booth or caravan. POLLOCK, C. B.—The latter part of the 46th section uses the words “house, room, or tenement;” the 38th section uses the words “house, room, booth,” &c.] In Black. Com., vol. 2, p. 16, it is said that the word “tenement, though in its vulgar acceptation is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature, whether it be of a substantial or sensible, or of an unsubstantial ideal kind.” In Lilly’s Abridgment the word tenement is thus defined:—“A tenement may be said to be any house, land, rent, or other such like thing which is any way held or possessed; and it is a word of very large and ambiguous meaning, and therefore not fit to be used to denominate or express anything which requires a particular description.” [POLLOCK, C. B.—In Tomlin’s Law Dictionary it is said: “Tenement (*tenementum*) signifies properly a house or homestead; but more largely it comprehends not only houses, but all corporeal inheritances which are *holden* of another, and all inheritances issuing out of or exerciseable with the same.” If a tent is erected in a field for the accommodation of persons playing at cricket, can that be said to be a tenement?] This booth was supported by posts fixed into the ground; and it was capable of being holden at a rent. [MARTIN, B.—In Co. Lit. 20 a, it is said:—“Tenements, *tenementa*. This is the only word which the said statute of Wm. 2, that created estates tail, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those *387] *inheritances, or concerning or annexed to or exerciseable within the same, though they lie not in tenure, therefore all these without question may be entailed.” That is the proper legal definition of the word “tenement.”]

Poland appeared for the appellant, but was not called upon to argue.

MARTIN, B.—I am of opinion that the determination of the justices

(c) Section 38.—“That the business and amusement of all fairs holden within the Metropolitan Police District shall cease at the hour of eleven in the evening, and shall not begin earlier than the hour of six in the morning; and that if any house, room, booth, standing, tent, caravan, wagon, or other place, shall during the continuance of any such fair be open within the hours of eleven in the evening and six in the morning, for any purpose of business or amusement, in the place where such fair shall be holden, it shall be lawful for any constable to take into custody the person having the care or management thereof, and also every person being therein who shall not quit the same forthwith upon being bidden by such constable so to do; and the person so then having the care or management of any such house, room, booth, standing, tent, caravan, wagon, or other place, shall be liable to a penalty not more than five pounds, and every person convicted of having been therein, and of not having quitted the same forthwith upon being bidden by a constable so to do, shall be liable to a penalty not more than forty shillings.”

ought to be reversed. The word "tenement," in the 46th section of the 2 & 3 Vict. c. 47, is used in connection with the words "house or room," and must mean something of the same character, and absolutely immovable from the land. I am disposed to think that this booth would be distrainable for rent, just as a cart or any other movable chattel. It is a "booth" in contradistinction to a "house" or "room." The 38th section of the 2 & 3 Vict. c. 47, speaks of a "house, room, booth, standing, tent, caravan, wagon, or other place;" and this portable theatre would be properly described as a booth, wagon, or caravan. Then, in the 46th section of the same Act, the legislature has used the expression "house or room;" and it being a matter of notoriety that persons go to fairs with booths, or travelling caravans, in which they perform, it would seem that the legislature has purposely omitted in that section the words "booth, standing, tent, caravan, wagon, or other place." The section goes on to speak of a "house or other tenement," and in another part of a "house, room, or tenement." Now a tenement means something fixed or permanent; and my impression is that the legislature purposely omitted to make this enactment extend to booths, otherwise they would have used in the 46th section the same words as they have used in the 38th. For the purpose of supporting this conviction, we ought clearly to see what the legislature intended by this Act; and in my opinion the [*388 offence charged has not been committed.

BRAMWELL, B.—I am of the same opinion. The case appears to me so clear that it is unnecessary to say anything upon it.

CHANNELL, B.—If I had to construe the 46th section by itself, I should say that this portable theatre was not a tenement within the meaning of that section; but construing it with the 38th section, and finding words in that section which are omitted in the 46th, I am clearly of opinion that this is not a tenement within the meaning of the 46th section.

POLLOCK, C. B., concurred.

Determination of justices reversed.

BASTIFELL v. LLOYD. June 5.

By charter-party the plaintiff and defendant agreed that the plaintiff's ship, "*Bebec*," should proceed to Llanelli, and take on board a cargo of culm, and being so loaded should "there-with proceed with all convenient speed to Cole's Wharf, Rochester, or so near thereto as she might safely get, and deliver the same on being paid freight, &c. The regular turn to be allowed for loading, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4*l.* per day." The ship arrived with her cargo at Rochester on the 24th October and was moored at the buoys, about 500 yards from and opposite to Cole's Wharf. On the 25th October the master gave the defendant's agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water for the vessel to come alongside the wharf, and the agent refused to send lighters to receive part of the cargo, so as to lighten the vessel and enable her to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th November, and on the following day she commenced discharging her cargo. In an action for demurrage:—Held, that the master was bound to take the vessel alongside Cole's Wharf, unless prevented by some impediment which endangered her safety, and as the inability to bring the vessel alongside the wharf was occasioned by the ordinary course of navigation the lay days did not commence until the vessel arrived there.

DECLARATION on a charter by the defendant of the plaintiff's ship, *389] called "The Bebec," to take on board *at Llannelly a cargo of culm and proceed therewith to Rochester.—Breach: that the defendant kept the ship on demurrage ten days, and thereby became liable to pay the plaintiff 40*l*.

Plea.—That the defendant did not keep the ship on demurrage.—Issue thereon.

At the trial, before Bramwell, B., at the London Sittings after last Easter Term, it appeared that the plaintiff and defendant agreed by charter-party (so far as material to the present case) that the plaintiff's ship "Bebec" "should with all convenient speed sail and proceed to New Dock or Channell, Llannelly, and take on board from the agent or wharf of the defendant a full and complete cargo of culm not exceeding what she could reasonably stow and carry over and above her tackle, &c., and being so loaded should therewith proceed with all convenient speed to Mr. Cole's Wharf, Rochester, or so near thereto as she might safely get, and deliver the same on being paid freight at the rate of 8*s*. 9*d*. per ton delivered, and one guinea gratuity to the master. The freight to be paid in cash on safe delivery of the cargo. The regular turn to be allowed the defendant for loading the ship at Llannelly, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4*l*. 4*s*. per day," &c.

The ship proceeded to Llannelly, and was there loaded with 420 tons of culm. On the 17th of October the ship sailed for Rochester, where she arrived on the 24th of October, and the master moored her at the Buoys, about 500 yards from and opposite to Cole's Wharf. On the 25th of October the master reported to the defendant's agent at Rochester the arrival of the vessel and his readiness to discharge the cargo. The defendant's agent requested the master to come along- *390] side Cole's Wharf. The master stated *that there was not sufficient water for his vessel alongside the wharf, but that if the defendant's agent would send lighters to receive a portion of the cargo, he would, when the vessel was lightened, bring her close to the wharf. This the defendant's agent refused to do. The state of the tide was such that the vessel could not get alongside Cole's Wharf until the 4th of November. On the following day she commenced discharging her cargo, and completed her unloading on the 14th.

It was contended, on behalf of the plaintiff, that when the vessel was moored at the Buoys on the 24th of October she was as near Cole's Wharf as she could then safely get, and that the defendant's agent ought to have commenced unloading her on the 25th: that the time for the delivery of the cargo, at the rate of fifty tons per working day, expired on the 4th of November, and that the defendant was liable for ten days' demurrage, from the 5th to the 14th of November.

It was submitted, on behalf of the defendant, that he was not bound to unload the vessel until she was alongside Cole's Wharf; and therefore he was not liable for demurrage.

The learned Judge was of opinion that the defendant was not bound to unload the vessel until she was alongside Cole's Wharf; and he left the following questions to the jury:—

First: Could the vessel have got alongside Cole's Wharf on the 24th of October?—The jury found that she could not.

Secondly: Was there any unloading of the vessel on the 14th of November?—The jury found that there was.

Thirdly: Was it the fault of the plaintiff or the defendant's agent that the unloading did not begin on the 4th of November?—The jury found that the defendant might have commenced unloading on that day.

*The learned Judge then directed a verdict for the plaintiff for 4l. 4s., the amount of one day's demurrage, reserving leave [*391 to him to move to increase the damages to 40l., if the Court should be of opinion that, upon the facts, the plaintiff was entitled to a verdict for the full amount of demurrage claimed.

Edward James, in the present Term, obtained a rule nisi accordingly, against which

G. Denman and *Prentice* now showed cause.—The question is when did the demurrage days commence. That depends on whether the defendant was bound to unload the cargo when the vessel arrived at the Buoys, or was entitled to wait until she was alongside Cole's Wharf. *Parker v. Winlow*, 7 E. & B. 942 (E. C. L. R. vol. 90), is an express authority that the defendant was not bound to unload the vessel until she was alongside the wharf. There the charter-party provided that "the ship should proceed to Plymouth, not higher than Torpoint or New Passage, or so near thereunto as she may safely get." The vessel arrived at Plymouth, and the consignees ordered her discharge at a wharf below Torpoint and New Passage. At that time the tides were neap, and in order to reach the wharf it was necessary to cross a mud bank, in doing which the vessel grounded and lay there until the high tides: it was held that the lay days did not commence until the vessel reached the wharf, the delay in getting to it being occasioned only in the ordinary course of navigation in a tidal harbour. In the absence of any express stipulation, the lay days are to be reckoned from the time of the ship's arrival at the *usual place of discharge* in the port, and not *at the port*, although for the purposes of navigation some of her cargo may be discharged at the *entrance: *Brerton v. Chapman*, 7 Bing. 559 (E. C. L. R. vol. 20); *Abbott on Shipping*, p. 304, 8th ed. Here the vessel was to proceed to Cole's Wharf, "or so near thereto as she might safely get," but she did not arrive so near the wharf as she might safely get, if by waiting for high water she might with safety have got nearer. A mere temporary obstruction does not determine the obligation to reach the place of discharge: *Schillizzi v. Derry*, 4 E. & B. 873 (E. C. L. R. vol. 82); and the master was bound to wait until there was sufficient water to enable him to get alongside Cole's Wharf. It was the duty of the plaintiff, before he entered into the contract, to acquaint himself with the nature of the place of discharge.

Edward James and *Dowdeswell*, in support of the rule.—When the vessel was moored at the Buoys she was as near Cole's Wharf as she could safely get; and the lay days commenced on the 25th of October, when the defendant's agent had notice that the vessel was ready to unload. No doubt, if a shipowner enters into a charter-party to proceed to a particular port, he is presumed to be cognisant of the

state of that port. For instance, if it be a harbour with a bar at its entrance which can only be passed at spring tides, he must be taken to know that fact; and the insertion in the charter-party of the words, "or so near as the vessel can safely get," will not relieve him from the obligation to reach the place of discharge. But a shipowner who enters into a charter-party is not bound to know the depth of water at every wharf in the port of destination. In *Parker v. Winlow*, 7 E. & B. 942 (E. C. L. R. vol. 90), the contract was to proceed to a tidal harbour, and therefore the shipowner must be presumed to have entered into the contract with knowledge that in the ordinary *393] course of navigation the vessel might be prevented from *reaching its place of discharge. There Lord Campbell said; "If, when the ship got fixed on the mud-bank, the master had given notice that he was ready to discharge there, it might have been open to him to show that it was the duty of the other party to take the cargo there; and if he could have shown such to be their duty, the lay days would have commenced." Here the plaintiff fulfilled his contract when the vessel arrived so near Cole's Wharf as the depth of water would permit. [POLLOCK, C. B.—According to that argument, if the tide changed whilst the vessel was proceeding to the wharf, the master would not be bound to go any nearer.] Suppose the vessel could only have got to the wharf when there was a very high tide, which might not occur more than once or twice a year, would the master be bound to wait all that time? Some effect must be given to the words, "or so near thereto as she might safely get." In *Brown v. Johnson*, 10 M. & W. 331,† it was held that the lay days were to be calculated from the period the ship arrived in the dock, and not at the place of unloading. [POLLOCK, C. B.—Suppose it had only been necessary to stop at the Buoys for one tide, would that have exonerated the plaintiff from his obligation to go alongside the wharf?] It would be a question for the jury, what was a reasonable time to wait for high water.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. The plaintiff only asks to increase the damages to 40*l.*; therefore, if there be any question which ought to have been left to the jury with respect to what was a reasonable time to wait for high water, the rule must nevertheless be discharged, because it cannot be made absolute for a new trial.

*394] It appears to me that the meaning of this charter-party *is that the vessel shall proceed to the wharf, that is, go alongside of it, and there discharge her cargo, and it is manifest that the object was to avoid the expense of lighters. That in some measure raises the question what was a reasonable time to wait for a sufficient depth of water to get alongside the wharf. That, however, is a question of fact for the jury, and this rule cannot be made absolute unless we see very clearly that the defendant was bound to send lighters to unload the vessel. It is conceded that if the vessel had been obliged to wait for one tide, that would not have got rid of the obligation to go alongside the wharf, but it is contended that it is unreasonable to wait for several days.] It seems to me, however, that there is no distinction in principle. This is a contract to get to the wharf if in the ordinary course of navigation it could be reached.

BRAMWELL, B.—I am of the same opinion. At the trial I was struck with the hardship of making the shipowner responsible for the condition of a particular wharf; but the charterer is responsible for the condition of the particular ship, and it was by the conjoint condition of the wharf and ship that the latter was prevented from getting alongside the wharf. The usual depth of the water at the wharf was a matter which either of the parties might have ascertained for himself. If there is any question of fact which ought to have been left to the jury, none was proposed; and assuming it to be a question for the Court, I cannot help thinking that the defendant is right when he says that the vessel was bound to go alongside the wharf. As pointed out by the Lord Chief Baron, the object of the charterer was to save the expense of lighterage. Suppose the shipowner found that he could not get alongside the wharf for two or three days, when the tide would rise high, he would clearly have been bound to wait, since he could then safely get there. He has *undertaken to go [*395 alongside Cole's Wharf, unless the want of safety renders it necessary that he should stop short of that place. It is admitted that by waiting a short time, he not only could, but did, get there. It might be different if there were only one or two tides in the year which would enable the vessel to reach the wharf, but it is not necessary to say what the master ought to do in that case. As it is, convenience and common sense are in favour of the defendant.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. No doubt, there are extreme cases which show that the contention on the part of the shipowner might not be unreasonable, but we cannot decide with reference to those cases. This is a contract between two parties which must receive a reasonable construction, and the prevailing rule is, that the words of a contract must be construed most strongly against the contractor. The words, "or so near thereto as she might safely get," are to be taken essentially as the words of the shipowner. *Parker v. Winlow* is an authority in favour of the defendant. In that case there were two points. The first has no application to this case, but the second is identical with it. No doubt there was no express mention in the charter-party of a particular wharf, but what was done between the parties showed that they intended that the wharf which was afterwards designated should be the wharf at which the vessel should actually arrive. Here the question is whether the vessel arrived alongside Cole's Wharf, within the meaning of the charter-party. I think it did not, and that the navigation was a risk which the shipowner took upon himself.

Rule discharged.

*LAWSON v. BURNES. May 28, 29.

[*396

By charter-party it was agreed between the plaintiff, owner of the ship "Sultan," and the defendant, that the ship should proceed to a certain dock and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered ships to be loaded, and it was their practice to enter ships not only before they were ready to load, but before their arrival at the dock, or even at the port, and if a ship was not ready to load when her turn came the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before

it. On the 29th November the plaintiff's ship arrived at the dock, and on the 8th December his agent told the manager that he was ready to load, but several ships which had not arrived and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book, and the loading of the plaintiff's ship did not commence until the 23d of January. The Judge left it to the jury to say what was the meaning of "regular turn," and they found that the plaintiff's ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or known custom, and that "regular turn" was the order of readiness, not the order of entry in the book.—Held, that the defendant was liable for demurrage.

THE declaration (in substance) stated, that the plaintiff, being owner of the ship "Sultan," and the defendant, being a merchant, agreed by charter-party that the said ship should proceed to Tyne Dock and there load in the customary manner from the agent of the defendant a cargo of Marley Hill coke, with sufficient coal for ballast, to be loaded in regular turn; and therewith proceed to Alexandria and there deliver the same.—Averment: that the plaintiff did all things necessary to entitle him to have the ship loaded by the defendant according to the said charter-party within a reasonable time.—Breach: that the defendant did not load the said ship in regular turn according to the said charter-party, and neglected and refused so to do, and wrongfully and improperly detained the said ship in loading for a long, unreasonable, and unnecessary time in that behalf, to wit, for fifty-five days, &c.

Plea (inter alia).—That the defendant did load the said ship in regular turn in accordance with the terms of the said charter-party, and did not neglect or refuse so to do, or detain the said ship in loading beyond the time allowed by the said charter-party in that behalf.—Issue thereon.

At the trial, before Willes, J., at the last Northumberland Spring *397] Assizes, it appeared that on the 24th of November, *1860, the plaintiff and defendant entered into a charter-party which (so far as material to the present case) was as follows:—"It is this day mutually agreed between Henry Lawson, owner of the good ship or vessel called the "Sultan," now in the Tyne, and James Burness of London, merchant, and agent for the freighter, that the ship being tight, staunch, and now every way fitted for the voyage, shall, with all possible despatch, sail and proceed to Tyne Dock, and there load in the customary manner from the agents of the said merchant, a full and complete cargo of Marley Hill coke, with sufficient coal for ballast, say not exceeding ten keels, to be loaded in regular turn(a) respectively, not exceeding what she can reasonably stow and carry over and above her tackle, &c.; and, being so loaded, shall therewith proceed to Alexandria, Egypt, or so near thereto as she may safely get, and there deliver the same on being paid freight," &c.

On the 29th November the ship proceeded to Tyne Dock, and on the following day the plaintiff's agent saw the manager of the Marley Hill Colliery and told him that the ship was there for a cargo of coke, and he entered her on a book called the "turn book." The coals for ballast were put on board on the 7th of December, and on the 8th the plaintiff's agent again saw the manager of the colliery, and told him that the ship was ready to receive the coke; when he said she would be loaded about the end of the next week. On the 20th of

(a) These words were printed in the charter-party.

December the plaintiff's agent again saw the manager, who said that several ships which were "in turn" before the plaintiff's had come in, and were in the course of being loaded; that several ships which were not ready had been got ready; that the plaintiff's ship could not be loaded that week or the next, but would probably be the week after. The plaintiff's agent again saw the manager of the colliery on the 15th and 21st of January and complained of the delay, but the *loading did not commence until the 23d of January, and was completed on the 25th. Vessels were usually loaded in four- [*398 teen days after they were ready.

It appeared by the evidence on the part of the defendant that only one ship could be loaded at a time, and that when the plaintiff's ship arrived at the dock there were thirty-one ships "in turn" before her. The "turn book" had been kept for twenty years, and during all that time ships had been loaded according to the order of their entry in the "turn book." It was the practice, however, to enter ships in the "turn book" not only before they were ready to load, but before their arrival at the dock, or even at the port; and if a ship was not ready to load when her turn came, the ship next in turn was loaded, and the other took its turn when ready, before others which had been ready before her. Evidence that this practice was known to shipowners was tendered and objected to, but admitted by the learned Judge. The Marley Hill coke, which was in great demand, could only be obtained from the Marley Hill Colliery.

The learned Judge left it to the jury to say; first, what was the meaning of the words, "regular turn:" did they mean according to the order of entry in the "turn book," or according to the period at which the ship was ready to receive her cargo?: secondly, was the vessel loaded in regular turn, and if not, how much time was lost? His lordship said there might also be another question—was the ship loaded in a reasonable time. The jury found that the vessel was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or known custom; and that "regular turn" was the order of readiness, and not the order of entry in the book. The learned Judge then said that upon this finding the question of reasonable time became immaterial, and a verdict was entered for the plaintiff for 85*l*. He certified that, if it was a question for him, he agreed with the finding.

**Manisty*, in the following Term, obtained a rule nisi for a new trial, on the ground of misdirection in the learned Judge [*399 telling the jury that, in deciding whether the ship was loaded in regular turn according to the charter-party, they must have regard to the fact whether the ship was loaded in a reasonable time; or on the ground that the verdict was against the weight of evidence.

Edward James (with whom was *Heath*) now showed cause.—There was no misdirection. The real question was whether the vessel was loaded in "regular turn" according to the charter-party, and the jury found that "regular turn" meant the order of readiness, not of entry in the turn book; therefore the question of reasonable time became immaterial. If the question is one of fact, it is concluded by the finding of the jury; if one of law, the learned Judge agrees with the finding.

The Court then called on

Manisty and *T. Jones*, to support the rule.—The question is whether the defendants loaded the ship in regular turn according to the charter-party. Now, the ship was to be loaded with a particular kind of coke which could only be obtained at this colliery, and therefore when the parties stipulated that the ship should be loaded “in regular turn,” they meant “regular turn” according to the practice of that particular colliery. The plaintiff must have known that, by the practice of the colliery, ships were loaded according to the order of their entry in the “turn book.” [POLLOCK, C. B.—The jury have found that it was not a known or established practice.] The ship could not have loaded in any other way. The Marley Hill Company in effect say, “You shall have no coke from this colliery unless you *400 enter the vessel in our ‘turn book,’ and load in the order of entry.” [MARTIN, B.—If so, the defendant entered into a contract which he could not perform.] *Robertson v. Jackson*, 2 C. B. 412 (E. C. L. R. vol. 52), is an authority that the practice of the Marley Hill Colliery was a regulation binding on all vessels that loaded coke at the Tyne Dock. [BRAMWELL, B.—If there was only one mode of loading at that colliery, there might be some ground for your argument; but why not load by lighters?]

POLLOCK, C. B.—We are all of opinion that the rule should be discharged. It is an application for a new trial on the ground of misdirection; and the question is, what is the meaning of the words “regular turn.” By the charter-party the vessel was to load in the customary manner a cargo of Marley Hill coke, and in regular turn. It appears to me that the words “customary manner” mean the mode of loading, whether by a lighter or at the wharf, and whatever was the customary manner was to be pursued on this occasion. Then mention is made of Marley Hill coke, but that is only an intimation of the quality of the coke. Then come the words “to be loaded in regular turn.” It appears that considerable delay arose from the Marley Hill Company postponing the plaintiff’s vessel to other vessels not ready when his was, but which afterwards were made ready; and in consequence this action was brought for demurrage.

The case on the part of the defendant was that Marley Hill coke was only to be had of one firm; that that firm kept a book in which vessels were entered, whether ready to load or not, and whether in the port or not; and that the practice was that if a vessel was not ready when her turn came she was put aside, and when ready she took her turn before those vessels which had been ready a long time. It was incumbent on the defendant to prove that this practice was well *401 known; and it is a mistake to suppose that there was any evidence that the plaintiff knew of it. The complaint is that the learned Judge left it to the jury whether the vessel was loaded in a reasonable time, but that is not so. The learned Judge left to the jury the question, what was the regular turn. The jury found that the vessel was loaded according to the practice of the Marley Hill Colliery, that is, that she was postponed to other vessels not ready when she was because her name was not first on the books, but that the practice was not an established or known practice, and that the “regular turn” was the order of readiness, not the order in the book.

Under these circumstances I am of opinion that there was no misdirection, and that the rule ought to be discharged.

MARTIN, B.—I am of the same opinion. The declaration is on a charter-party by which the plaintiff's vessel was to load a cargo of coke in regular turn, and the breach is that the vessel did not load in regular turn. Therefore the question which the parties went down to try was, whether the vessel loaded in regular turn. The plaintiff produced the charter-party, by which it was agreed between the plaintiff and defendant that the plaintiff's vessel should proceed to Tyne Dock and there load in customary manner from the agents of the defendant a full and complete cargo of Marley Hill coke, "to be loaded in regular turn." Such being the terms of the charter-party, it was necessary that evidence should be given of the meaning of the words "regular turn;" and the case of *Robertson v. Jackson*, 2 C. B. 412 (E. C. L. R. vol. 52), shows that such evidence is admissible.

I entertain no doubt whatever as to the meaning of the words "regular turn," because there is an Act of Parliament, 10 & 11 Vict. c. 27, s. 67, which regulates the loading and unloading of vessels in *docks. It was contended on the part of the plaintiff, that the words "to be loaded in regular turn" meant that the vessel [*402 which, in the order of time, arrived first was to be loaded first, provided she was ready to receive her cargo. On the part of the defendant, evidence was given of a practice of the Marley Hill Colliery to enter in a book the names of vessels about to be loaded, and that preference was given to vessels in the order in which they were entered in the book, though not ready to receive a cargo; so that, according to the practice, vessels entered first in the book but not ready to load, loaded before vessels which were ready to load. The question is, what is the true meaning of this contract between two persons who are not members of the Marley Hill Colliery, and have no connection with it except that they take coke from it? The learned Judge left it to the jury to say what was the meaning of loading in regular turn, and the jury found that "the vessel was loaded according to the practice of the Marley Hill Colliery;" but they proceeded to say "that it was not an established or known custom." Therefore they negative the allegation that the vessel was loaded in regular turn; and they go on to say, "that 'regular turn' is the order of readiness, not the order in the book." I cannot conceive anything more unreasonable than that, where two persons enter into a charter-party by which a vessel is to load in regular turn, vessels which come in after it should load before it because, by the practice of the colliery, vessels which are entered first in the book, though not ready to load, are loaded before those which are ready. If it was intended that the contract should be according to the practice of the colliery, the parties should have said so: they say nothing of the kind, but merely that the vessel shall be loaded in regular turn. For these reasons I think the verdict right, and that the rule ought to be discharged.

*BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. This is an action on a charter-party, by [*408 which a vessel was to proceed to Tyne Dock, and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." Now, merely reading the charter-party, there is

nothing which enables us to put a meaning on the words "regular turn." As Tindall, C. J., said in *Robertson v. Jackson*, 2 C. B. 412, 427 (E. C. L. R. vol. 52), the words in themselves bear no precise meaning until they obtain their application by the evidence. No judge or jury, looking at the contract itself, can discover when it is that the ship's turn to deliver will arrive, or, consequently, from what day the demurrage is to be calculated. Evidence, therefore, is necessary to explain how those words apply themselves to the regulations and practice of the port where the delivery of the cargo was to be made. That being so, there are two possible meanings of the words "to be loaded in regular turn;" one, that the vessel was to be loaded according to her regular turn, that expression having a general meaning applicable to any port; the other, that she was to be loaded in regular turn according to the practice of the port where the loading was to take place. Either as one or other of those is the proper meaning the shipowner or charterer is entitled to succeed. The shipowner says "I mean the regular turn in the order of readiness;" the charterer says "I mean the regular turn according to the practice at the particular spot." The learned Judge left it to the jury to say which of the two meanings was the right one, and they said that the expression "regular turn" has a known meaning applicable to a port generally,—the order of readiness, not the regular turn, according to the practice of that particular colliery.

It is manifest that, the jury having so found, there is no occasion *404] for further argument; but I confess that I cannot agree with any criticism upon the practice of the Marley Hill Colliery as unreasonable. Here is a Company for the supply of a particular kind of coke, which is in great demand, and they have made regulations as to the order in which ships are to be loaded with it. It is said that, as regards those who do not know their practice, it is unreasonable; but how can we say that what people find the best mode of conducting their business is unreasonable?

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. In order to determine whether there was any misdirection, we must look to the claim, which is for demurrage; and the question which arises between the shipowner and charterer is, whether the vessel loaded in "regular turn." If that is a question of law, I agree with the learned Judge who tried the case. If it is a question of fact, I agree that the evidence was properly received. The contract is to load, in the customary manner, a cargo of Marley Hill coke. It is not "customary order," but "customary manner," and that refers to the mode of loading. The words "Marley Hill coke" are only a description of the coke with which the vessel was to be loaded; then come the words "to be loaded in regular turn." The jury have put a meaning on those words; and I can see nothing wrong in the mode in which the learned Judge left the question to them. This case is distinguishable from *Robertson v. Jackson*. There the usage of the port was not applicable to all vessels trading to it, but only to vessels carrying coals destined for a particular purpose; here it is sought to apply the practice of the Marley Hill Colliery to all vessels loading at that colliery. It may be a very reasonable practice for the Marley Hill Company to keep a book in which they enter vessels to be

loaded, in order to know what quantity of coke to provide; but that cannot in this case affect the charterer and shipowner, since it is no *part of their contract. The fact that the words "regular turn" [405 are printed in the charter-party, relieves me from any apprehension that I am putting on the contract a construction different from that which the parties intended. Rule discharged.(a)

(a) See *Taylor v. Clay*, 9 Q. B. 713 (E. C. L. R. vol. 58).

STUCLEY, Bart., v. BAILY. May 29, 30.

Where representations, which may amount to a warranty, are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of showing that no warranty was contemplated by the parties.

In an action for a breach of warranty of a yacht sold by the defendant to the plaintiff, it appeared that the plaintiff's agent, having entered into negotiations for the purchase of the yacht, told the defendant's agent that he must have the masts overhauled or examined by a shipwright. The defendant's agent subsequently wrote:—"I have had a good overhaul at the masts, and find they are all as sound as ever." The plaintiff's agent then wrote to the defendant offering 3000*l.* for the yacht, and observing that the plaintiff would probably have to spend 500*l.* in repairs. The defendant wrote in reply declining to take less than 3500*l.*, and saying:—"You must, I think, be under some very great error in thinking that 500*l.* would be required to be spent. Beyond the usual painting, caulking, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. Personally I know her sea-going qualities, and how thoroughly sound she is and tight in every part." In a subsequent letter the defendant said:—"Her masts have been examined and found as sound as when put in." After some further correspondence the plaintiff bought the vessel for 3375*l.*, and a bill of sale was executed in accordance with the "Merchant Shipping Act, 1854."—Held, that, assuming the representations in the letters were some evidence of a warranty, it was competent for the defendant to prove what by passed between the parties both before and after the letters were written, that no warranty was contemplated.

Semble, that the representations in the letters did not amount to a warranty.

Quære, whether it was competent for the plaintiff to set up a warranty, inasmuch as none was contained in the bill of sale.

THE declaration stated that the defendant, by warranting a certain yacht or vessel, called the "Czarina," to be sound and tight, and that her masts were as sound as when put in, sold the yacht or vessel to the plaintiff, to wit, for the sum of 3500*l.*, which sum the plaintiff accordingly paid to the defendant: yet the said yacht or vessel was not at the time of such sale sound and tight, nor were her masts as sound as when put in; but, on the contrary, was at such time rotten and in great decay in her masts, and unseaworthy, and in a bad state and condition. Whereby the plaintiff was put to great expense of his moneys, to wit, the sum of 217*l.* 2*s.* 3*d.*, in removing the said masts, and in *replacing them with new ones, and in the necessary expenses attending such repairs, and in rendering the [406 said yacht or vessel seaworthy, &c.

Plea.—That the defendant did not warrant the said yacht or vessel as alleged.—Issue thereon.

At the trial, before Byles, J., at the last Hampshire Spring Assizes, the following facts appeared:—The plaintiff, being desirous of purchasing a yacht, requested one Captain Main to inquire about one for him. Captain Main, having seen an advertisement of a yacht for sale, called the "Czarina," with a reference to the captain of it, Mr. Williamson, of Chatham, wrote to him the following letter:—

"Brilliant Yacht, Northan, Southampton.

"3d February, 1860.

"Sir.—I have heard that the 'Czarina' is for sale. If so will you be so good as to send me an inventory of stores to be sold with her, and their general condition; and also to inform me the state of the vessel, whether there is anything absolutely necessary to be done to her to make her fit for a twelve months' cruise abroad?

"I remain, &c.,

"E. W. MAIN."

Captain Williamson sent in reply the following letter:—

"304, High Street, Chatham, 5 Feb. 1860.

"Sir.—In answer to yours, I have sent you an inventory of the 'Czarina's' stores, and they are all as described. The sails having had only a few weeks' sailing about the Channel, the ship would require no more than the usual routine of scraping, cleaning, and painting; perhaps, a little overhauling of the copper; the hull of the ship as sound as when launched; boats,—three, the same age as the ship, built in 1853; the price, Mr. Baily, the owner, has told me is *407] 4000*l*. His address is T. F. Baily, Esq., Hall Place, *Tonbridge. I shall be glad to answer any further inquiry, or to show the ship and stores.

"Yours, truly,

"H. C. WILLIAMSON."

In the inventory which was printed and annexed to the advertisement, the masts were described as one main mast, one fore mast, without any further description. Captain Main communicated with the plaintiff and afterwards went with Captain Williamson to Chatham, to see the yacht. Captain Main stated, in his evidence, that the general appearance of the vessel was satisfactory, but on scraping the paint off the masts, he found they were made of yellow pine, and he told Captain Williamson that he did not like the yellow-pine masts. He could not ascertain the condition of the masts where they passed down through the deck, for at that part they were covered with cloths and wedges driven in, and he told Captain Williamson that he must have the vessel examined or overhauled by a shipwright; that the coats of paint must be removed and the masts examined under the wedges, and a report of the examination made; and then he would make an offer for the vessel.

Subsequently Captain Williamson wrote to Captain Main the following letter:—

"304, High Street, Chatham, 15th Feb. 1860.

"Sir.—I have had a good overhaul at the masts, and find that they are all as sound as ever. I wrote to Mr. Baily, and told him you had been to Chatham, and seen over the ship and stores, and that he might expect a letter from you. Any letter from yourself to me will at once meet the prompt attention of,

"Yours, truly,

"H. C. WILLIAMSON."

This letter was forwarded to the plaintiff, and on the 20th of February, Captain Main, with the plaintiff's sanction, wrote to the defendant offering 3000*l*. for the yacht and stores mentioned in the inventory, observing that the *plaintiff would probably have to spend *408] 500*l*. in repairs. The defendant wrote in reply as follows:—

"5, Royal Crescent, Brighton, 21st Feb. 1860.

"Sir.—I have the pleasure to acknowledge the receipt of your favour of yesterday's date. You must, I think, be under some very great error in thinking 500*l.* would be required to be spent in the 'Czarina' before she would be fit for sea. Beyond the usual painting, caulking, chintzing, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. I have always kept her afloat, and always had a careful person living on board, and have been indeed most anxious to keep her always in first-rate order. Her sails are next to new, having only been used for a six weeks' cruise. The quality of the materials I know to be of first rate, and the late Mr. Bevis, for many years sailing-master of the 'Dolphin,' saw every atom of timber which was used in her during her construction; and, personally, I know her sea-going qualities, and how thoroughly sound she is and tight in every part. My sailing master says he named to you 4000*l.* as her price, which was what I originally intended. I do not really think I should be doing justice to myself were I to take a less sum than 3500*l.* for her; indeed, I have refused considerably over 3000*l.* more than once. Lloyd's people also have surveyed her, and their report is most favourable, I hear—I have not seen it. In conclusion, let me add, I think when you take into consideration her state, you will find that you have enormously mistaken the required outlay, and that the schooner is fairly worth my price. I have another gentleman who is after the ship now; so please turn this well over and favour me with a line, say at the end of the week.

"Your obedient servant,

"THOS. F. BAILY."

Subsequently the plaintiff, through Captain Main, offered *3250*l.* for the yacht, and thereupon the defendant wrote to [409 Captain Main the following letter:—

"5, Royal Crescent, Brighton, 4th March, 1860.

"Sir.—I beg to thank you for your favour, to which I have not been able previously to reply. I am sorry you still fancy the 'Czarina' will require so much money laid out upon her, and still must say that I cannot help thinking her refitting will not be nearly so costly as you seem at present to imagine. Her masts have been examined and found as sound as when put in,—since I wrote last, I think. Further, I regret that the gentleman who wishes to purchase her thinks my figure of 3500*l.* too much, for honestly I believe she would be a very cheap ship to any one at that price. It is very good of you to recommend her. I am sure you can do so conscientiously, for she is a glorious vessel, and really I quite abhor letting her go. As, however, my military duties will certainly prevent my sailing this summer, at all events, I am willing to meet your offer in what, I hope, both yourself and the intended purchaser will deem a liberal spirit, and am satisfied to 'split the difference' between my price and the offered 3250*l.*, which latter sum I really don't think I am justified in accepting. Please let this have all due consideration, and favour me with a line at your earliest convenience; and with thanks for your polite letter,

"I remain, sir, your faithful servant,

"THOS. F. BAILY."

The plaintiff replied as follows:—

"8, Eaton Square, London, March 8, 1860.

"Sir.—Captain Main forwarded to me yesterday by post your letter of the 4th. I am pleased to find by it that he has conducted the correspondence with reference to the purchase of the 'Czarina' to your satisfaction. Having myself but an imperfect knowledge of the merits of ships as regards their condition and value, I was glad to employ *410] *one competent to go into such matters, and a person in whom I could trust. Mr. Main's private opinion to me was, that I ought not to give more than 3000*l.* for the 'Czarina.' If I went beyond that sum, it was my intention to build a new vessel, for at the present prices a short step beyond 3000*l.* would suffice to build a vessel of 200 tons, and old vessels depreciate so very rapidly that what are gains in the first purchase are losses very much more at a subsequent sale. However there was much to make me desirous of buying the 'Czarina.' She appears sound; her stores are good, and her size suitable. With these convictions I advanced my biddings 250*l.* I cannot undertake to make a further offer of 125*l.*, unless you will throw in the various stores which belong to the vessel but are not named in the catalogue, such as charts, colours, chronometers, pikes, and other odds and ends which probably I should not purchase. But they having been a portion of the vessel, it is hardly worth while to separate them from it. I have endeavoured to be very plain and straightforward in this matter, and have represented just what I feel on the subject. Should you think proper to let me have the 'Czarina' upon these conditions, I hope you will allow your captain to work her around to Southampton, and there give her up, stores and all, to Mr. Main for me, I paying all expenses attending such a voyage. Yesterday I went to Chatham to see the 'Czarina' for the first time. I consider she requires all the repairs mentioned by Captain Main, painting throughout; but she is a fine vessel and appears to be well cared for. Should you sell me the vessel, you would very much oblige by informing whether your captain would then be disengaged . . . I hope this matter may now be concluded one way or the other, without further delay, as if I build I would set to work immediately.

"I remain, Sir, yours faithfully,

"G. S. STUCLEY."

*411] *The defendant wrote in reply accepting the plaintiff's offer, and the plaintiff then wrote to the defendant a letter containing the following passages:—

"8, Eaton Square, March 12, 1860.

"Dear Sir.—I shall be glad to purchase the vessel upon the terms agreed upon. The next matter for arrangement is about the payment. Of course, I shall require a few days for the selling a sufficient sum out of various securities. Will you tell me, when the money is ready, into which bank you desire that it should be paid? I certainly think I could not have purchased a sounder or better ship.

"Believe me, dear Sir, yours faithfully,

"G. S. STUCLEY."

On the 21st of March the plaintiff and Captain Main went to Chatham; and, according to the evidence of the latter, Captain Williamson then stated that he had ripped the mast-coats off, and had the masts regularly surveyed. A few days afterwards the vessel was taken to Southampton, and the purchase-money was paid. On the

vessel being fitted out for a voyage to the Mediterranean, the masts were found to be rotten. On the 17th May, Captain Main wrote to the defendant stating that it was on the guarantee of Captain Williamson that he had advised the plaintiff to purchase the vessel, but that when about to put on new mast-bolts it was discovered that the masts were quite rotten; and that the vessel's copper was as bad as could be, and that he was compelled to take it off and recopper her all over.

It was objected, on behalf of the defendant, that there was no evidence of a warranty, and that in order to maintain the action the plaintiff was bound to prove a sale and transfer of the vessel, as required by "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104).

*The plaintiff's counsel then put in the bill of sale, which was dated the 23d of April, and registered the 29th of May, [*412 1860. It was in accordance with the form prescribed by Schedule E of the Merchant Shipping Act, 1854.

It was then objected, on behalf of the defendant, that the bill of sale was the actual contract between the parties, and that as it contained no warranty the plaintiff was precluded from setting up a warranty. *Harnor v. Groves*, 15 C. B. 667 (E. C. L. R. vol. 80), was referred to. The learned Judge ruled that the letters contained a warranty, and that the plaintiff was not precluded by the bill of sale from setting it up.

The defendant's counsel then submitted that warranty was a mixed question of law and fact, and for the purpose of showing that there was no warranty, he tendered evidence of what took place at the interviews between Captain Main and Captain Williamson on the 11th of February, and the plaintiff and Captain Williamson on the 21st of March. The learned Judge ruled that, as the letters contained a warranty, the proposed evidence was not admissible, and a verdict was entered for the plaintiff with 180*l.* damages.

Karslake, in last Easter Term, obtained a rule nisi for a new trial on the ground of misdirection on the part of the learned Judge in ruling that the letters amounted to a warranty, and excluding evidence on the part of the defendant of all the facts of the case for the purpose of showing that the letters did not amount to a warranty; and also on the ground that the learned Judge was wrong in ruling that the bill of sale did not contain the whole contract and exclude a warranty; against which

Montague Smith and *H. T. Cole* now showed cause.—(They argued, first, that the letters contained a warranty. *On this point the following authorities were cited: *Chanter v. Hopkins*, 4 M. & [*413 W. 399;† *Cave v. Coleman*, 3 Man. & R. 2; *Hopkins v. Tanqueray*, 15 C. B. 130 (E. C. L. R. vol. 80); *Williamson v. Allison*, 2 East 446; *Schneider v. Heath*, 3 Camp. 506; *Addison on Contracts*, p. 126, 4th ed.)—Secondly, as the letters constituted the contract, parol evidence was not admissible for the purpose of showing that they did not contain a warranty. [POLLOCK, C. B.—There is a distinction between an instrument which professes to be a contract, as, for instance, an agreement inter partes, and where certain terms are contained in a number of letters, which are only evidence of a contract.] In *Dobell v. Hutchinson*, 3 A. & E. 355 (E. C. L. R. vol. 30), where it was held that letters written after a sale of land by the vendor to

the vendee, might be connected with the particulars and conditions of sale so as to constitute a memorandum in writing within the 4th section of the Statute of Frauds, the decision proceeded on the ground that the letters expressly and distinctly referred to the conditions of sale, which were signed by the vendee. [POLLOCK, C. B.—Here there is nothing which professes to be a formal contract, but the contract is to be collected from a number of letters; then why is not parol evidence admissible to show the real intention of the parties when they wrote them?] The contract being in writing, it is for the Court to construe it. [CHANNELL, B.—Evidence is admissible to explain an ambiguity in a written contract: *Smith v. Thompson*, 8 C. B. 44 (E. C. L. R. vol. 65).] In *Allen v. Pink*, 4 M. & W. 140, 144,† Lord Abinger said that it was a general principle, “that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked at to ascertain the terms of the contract.” *Hamilton v. Terry*, 11 C. B. 954 (E. C. L. R. vol. 73), is an authority that these *conversations are inadmissible,—
 *414] (They argued, thirdly, that it was competent for the plaintiff to contend that there was a warranty, notwithstanding it was not included in the bill of sale; inasmuch as the bill of sale merely transferred the property, and did not contain the terms of the contract. On this point they cited *Chapman v. Callis*, 2 F. & F. 161, 9 C. B., N. S. 769 (E. C. L. R. vol. 99); *Duncan v. Tindall*, 13 C. B. 258 (E. C. L. R. vol. 76); the Merchant Shipping Acts, 17 & 18 Vict. c. 104, ss. 55, 57, 18 & 19 Vict. c. 91, s. 11.)

Karslake and *Kingdon* appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B.—I am of opinion that the rule ought to be absolute for a new trial, on the ground that the evidence of the conduct of the parties should have been submitted to the jury. If it was competent for the jury to consider what the parties wrote to each other, they ought also to have heard what they said to each other,—what was their conduct, what passed between them, or came to the knowledge of either, which would show their real intentions. I do not express any opinion on the point, but I entertain considerable doubt whether the letters can be considered as a warranty, or anything more than a mere representation. But the conduct of the parties, what each said to the other either before or after the contract, ought to be submitted to the jury. If, at an interview before the correspondence, the plaintiff said to the defendant, “I want to buy your vessel,” and the defendant replied, “very well; the price so and so,” adding, “she is sound,” but never intending to warrant her; that, though falling very far short of conclusive evidence, might be important as showing the meaning of the transaction. It is said that where a warranty is contained *in a written instrument it cannot be altered
 *415] by parol evidence, but that is not so here. There is only a correspondence, and that may be explained by the conduct of the parties.

MARTIN, B.—I am of the same opinion. In the absence of knowing what was the exact evidence tendered by the defendant’s counsel, it is difficult to say whether it was admissible. Whether parol evidence is admissible or not must depend upon what it is, and it seems to me

that, in case of an objection to such evidence, the most satisfactory way is to take down in writing the question proposed to be put, so that the Court which may have to adjudicate upon its admissibility, may know what it really was. For many years I have made it a practice, whenever an objection is taken to the admissibility of parol evidence, to take down the question in writing, so that the Court above may understand what they have to deal with.

Upon the other point, I entertain a strong opinion that there was no warranty. This is an action on a warranty, properly so called, in respect of the quality of a ship. The best definition of a warranty is that given by Lord Abinger in *Chanter v. Hopkins*, 4 M. & W. 399, 404:†—"A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it." He then goes on to point out that in many of the cases "the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and the breach of such contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy *peas* of another, and he sends him *beans*, he does not perform his contract; but that is not a *warranty; there is no *warranty* that he should sell him *peas*; the [416 contract is to sell *peas*, and if he sends him anything else in their stead, it is a non-performance of it." Therefore the question is whether there was a warranty within the true meaning of the definition given by Lord Abinger. I think the plaintiff's case was defective, because it was incumbent on him to prove a sale, and, if no bill of sale had been executed, no action could have been maintained for a breach of warranty. It may be that there would have been a breach of the contract to sell, but that would be no ground for an action in respect of a breach of warranty. Nothing is more common than an action in respect of a contract to sell land. Now, if a contract to sell land contained an express undertaking that the land was of a particular quality, or that there was a coal-mine under it, if the vendor refused to complete his contract, an action would lie against him for not selling the land, not for a breach of the undertaking that it was of a particular quality, or had a mine under it.

The case of *Hopkins v. Tanqueray*, 15 C. B. 130 (E. C. L. R. vol. 80), is against the plaintiff's view. I agree with what was there said by Maule, J., and Crowder, J. Crowder, J., said: "A representation to constitute a warranty must be shown to have been intended to form part of the contract." Here the defendant never intended that his statement as to the soundness of the masts should form part of the contract. For these reasons I think there has been a miscarriage, and that there ought to be a new trial.

With respect to the question whether, after the bill of sale was executed, the plaintiff could insist upon a warranty. I express no opinion. If it should arise on a future trial, I should be glad if it were submitted to a Court of error. The question is whether, where parties have executed a *deed to carry out an agreement, and [417 it is found that in the course of the negotiations for that agreement something has been said which led to it, but which has not been embodied in the deed, they can fall back upon the agreement. It

would seem that if that could be done it would affect a man's title, for, instead of having a deed as evidence of it, his title would be affected by what took place before the deed was executed. That is undoubtedly a most important point, and I should regret if it were to be ultimately decided by this Court; it is a proper question for a Court of error.

BRAMWELL, B.—I am also of opinion that the rule ought to be absolute. As to the last point adverted to by my brother Martin, I say nothing. With respect to the two other points, I think it is due to the learned Judge who may be called upon to try the case again, to state my view of them.

I agree with my brother Martin that there is no evidence of a warranty. I also agree with the definitions he has referred to; and that a representation, to constitute a warranty, must form part of the contract. No doubt there may be a warranty without the word "warrant" or even "undertake" being used: if it can be collected from the documents between the parties, or if any reasonable person would understand, from what was said by them, that they intended that there should be a warranty, there would be one. Now I cannot think that there was any warranty here, but supposing there was any evidence of it, it is manifest that the whole facts ought to be inquired into and the question left to the jury. The evidence begins with a correspondence between Captain Main and Captain Williamson about the purchase and condition of the vessel. They afterwards met and *418] had some conversation about it, and Captain *Main states in his evidence:—"I said I did not like the yellow masts. He said they were very stiff and sound. I told him I must have them overhauled or examined by a shipwright." On cross-examination he says:—"I told Captain Williamson the wedges must be taken out as well as the mast-bolts for the purpose of examination." Now, suppose Captain Williamson had said in reply, "If you want the wedges taken out, you must have a shipwright," I cannot understand why that would not have been evidence to be laid before the jury. If facts antecedent to the contract may be given in evidence, so also may acts subsequent to it, for they would be evidence of what exists incidentally, and therefore, although subsequent facts could not be given in evidence to alter the contract, they might for the purpose of explaining the antecedent facts.

I wish to make another observation upon these letters for the purpose of justifying the opinion I entertain, that they do not contain any warranty. After the interview to which I have referred, Captain Williamson wrote to Captain Main: "I have had a good overhaul at the masts, and find they are all as sound as ever." Then the defendant in his letter to Captain Main says: "You must, I think, be under some very great error in thinking 500*l.* would be required to be spent on the 'Czarina' before she would be fit for sea." He does not say: "It cannot be," but merely, "You have expressed an opinion, and I think you are mistaken." He then goes on: "Beyond the usual painting, caulking, chintzing, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs." Is not that the language of a man who is doing nothing more than saying, "to the best of my judgment and belief you must be wrong, because I do not

think that any other repairs are necessary"? He goes on to say "Personally I know her sea-going qualities, and how thoroughly sound *she is and how tight in every part." That means [*419 nothing more than this: "She has no manifest defect: she has not dry rot in any place in which I ever looked." Suppose he had been asked: "Do you undertake to say that she has no dry rot?" He would reply: "No, I will not." Then if the other said, "I will not buy the vessel unless you do," he would say, "I will not undertake so as to render myself liable to damages if it is not so." He only undertakes so far as his personal knowledge and belief extends. Then, in the next letter, the defendant says: "I am sorry you still fancy the 'Czarina' will require so much money laid out upon her, and still must say that I cannot help thinking her refitting will not be nearly so costly as you may seem at present to imagine." What is that but an interchange of opinion between the parties? He then says: "Her masts have been examined, and found as sound as when put in." That is merely a statement that the masts had been overhauled by somebody who was satisfied that they were sound. In answer there is the plaintiff's letter, in which he says: "Yesterday, I went to Chatham, to see the 'Czarina' for the first time. I consider she requires all the repairs mentioned by Captain Main, painting throughout; but she is a fine vessel, and appeared to be well cared for." Under these circumstances, it seems to me that it cannot for one moment be supposed that the defendant entered into any undertaking that the vessel was sound to his knowledge. It is in vain to go through the cases on the subject. No doubt, a representation made at the time of the contract may amount to a warranty. If a man, when he sells a horse, says it is sound, that is a matter of fact; and when he makes a positive statement of that kind, he undertakes that he knows the fact; and if it is not so, he tells an untruth. So, if he does not know the fact, he equally tells an untruth, and there is no reason why he *should not be responsible. I should be [*420 more inclined to hold a person liable upon a representation as to a matter of fact of that kind than as to a matter out of his ordinary knowledge. For instance, suppose a man says a horse is sound, and it turns out that it has some defect which it was impossible that he could have known, I doubt whether his language ought to be interpreted as a warranty.

For these reasons, I am of opinion that these letters do not contain any evidence of a warranty. But, upon the supposition that they do, it is clear to demonstration that where the alleged warranty is not found in a document which is the contract between the parties, but depends upon the construction of a series of letters and extrinsic circumstances, inquiry must be made into all the surrounding facts, what the parties said and what they did, the facts anterior to the contract, contemporaneous with the contract, and posterior to the contract. Therefore, it must be submitted to a jury to say, whether, upon the whole evidence, they find that there was a warranty.

CHANNELL, B.—I am also of opinion that the rule ought to be absolute. I entirely concur in the views expressed by the Lord Chief Baron and my brother Martin. Some points occurred upon which I express no decided opinion. It seems to me clear that the plaintiff

- ♦ must establish, first, that there was a sale, and next, that the letters not only constitute a contract, but also contain a warranty. If I were called upon to express a definitive opinion, I should agree that the letters do not establish a warranty; but as the case must go down on a new trial upon another ground, it is not necessary to decide that point.

Now, without saying that these letters do not create the contract (though I am not certain that they do), I am of opinion that the learned Judge was not right in rejecting *the evidence. But *421] assuming that all that occurred in these letters was preliminary to the contract, and that the sale was effected by the bill of sale, it was a question for the jury whether it proceeded upon the terms contained in the preliminary contract. Where goods are put up for sale by auction under certain conditions prescribed in the particulars of sale, and a person bids, but says, "I will not adopt condition No. 1 or No. 2," he does not purchase under the conditions mentioned in the particulars, and it becomes a question whether he has bound himself by the terms of the sale. I agree with my brother Martin that it would have been more satisfactory if the particular question had been taken down in writing, so that it might have clearly appeared whether or no it was admissible: but, as I understand the nature of the evidence offered, I think that the learned Judge ought to have received it, in order to determine whether the bill of sale proceeded on the preliminary contract contained in the letters. Rule absolute.

If it be borne in mind that a warranty remains a self-existent contract, though it is connected with and seems to form part of the contract of sale, there will be little likelihood of mistaking a representation for it. And this is the interpretation to be put upon Lord Abinger's language quoted by Baron Martin in the principal case: "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object it." *McFarland v. Newman*, 9 Watts (Pa. 1839) 55. In *Congar v. Chamberlain*, 14 Wisconsin (1861) 258, the warranty was independent, being made after the sale. To establish a warranty all the constituents of a contract must be proved. The mutual assent of the parties and an adequate specification of the terms are essential to it; and the modern cases require them to be unequivocally established. *Foster v. Cald-*

well, 18 Vermont (1846) 176; *Jackson v. Wetherill*, 7 S. & R. (Pa. 1822) 480; *Bond v. Clark*, 35 Vt. (1863) 577; *Weimer v. Clement*, 1 Wright (Pa. 1860) 147; *Rockafellow v. Baker*, 5 Wright (Pa. 1861) 319; *Deuel v. Higgins*, 5 Cooley (Mich. 1861) 223; *Tyre v. Causey*, 4 Harrington (Del. 1846) 425; *Lindsay v. Davis*, 9 Jones (Mo. 1860), 406; *Henson v. King*, 1 Jones (N. C. 1856) 419; in which case the North Carolina authorities are cited. The common law principle is thus justified by C. J. Gibson: "the relation of buyer and seller unlike that of *cestui que trust*, attorney and client, or guardian and ward, is not a confidential one; and if the buyer, instead of exacting an explicit warranty, choose to rely on the bare opinion of one who knows no more about the matter than he does himself, he has himself to blame for it. If he will buy on the seller's responsibility, let him evince it by demanding the proper security; else

let him be taken to have bought on his own. He who is so simple as to contract without a specification of the terms, is not a fit subject of judicial guardianship. Reposing no confidence in each other, and dealing at arms' length, no more could be required of parties to a sale, than to use no falsehood; and to require more of them would put a stop to commerce itself, in driving every one out of it by the terror of endless litigation." *McFarland v. Newman*, *supra*; *Evans v. Maxwell*, 3 *Murphey* (N. C. 1819) 241; *Seixas v. Woods*, 2 *Caines* (N. Y. 1804) 48; *Hart v. Wright* 17 *Wend.* (N. Y. 1837) 267, s. c. in error 18 *Wend.* 459; *Waring v. Mason*, 18 *Wend.* (1837) 425; *Beirne v. Dodd*, 1 *Selden* (1851) 95; *Hotchkiss v. Gage*, 26 *Barbour* (N. Y. Sup. Ct. 1857) 141; *Moore v. McKinlay*, 5 *Cal.* (1855) 471. South Carolina has adopted the civil law doctrine, that a sound price warrants a sound article; but the experience of that state has, it is now acknowledged, justified the prediction which was made by C. J. Gibson. The impracticable character of the principle is thus admitted by Chancellor Dunkin: "The doctrine of implied warranty was an

innovation upon the principles of the common law which required parties to examine for themselves, and if they deemed it necessary, to protect themselves by proper covenants. Judges of the largest experience have often regretted the introduction of a different doctrine as the source of much unprofitable and vexatious litigation; and the universal opinion seems to prevail that it should not be further extended." *Prescot v. Holmes*, 7 *Richardson's Equity* (1854) 9. Accordingly, where from the circumstances of the case a contract could not exist, the common law doctrine prevails: *Parker v. Partlow*, 12 *Richardson Law* (1860) 679.

Many of the cases go quite far in holding that a representation or positive statement of material facts by the vendor, which influences the vendee to make the purchase, is equivalent or amounts to an express warranty: *Ricks v. Dillhanty*, 8 *Porter* (Ala. 1838) 134; *Benton v. Young*, 5 *Harrington* (Del. 1849) 238; *Randall v. Thornton*, 43 *Me.* (1857) 226; *Tuttle v. Brown*, 4 *Gray* (Mass. 1855) 457; *Lamme v. Gregg*, 1 *Metcalfe* (Ky. 1858) 444; *Blythe v. Speake*, 22 *Texas* (1859) 430.

CRESSWELL v. HEDGES. June 11.

Where, in an action of trespass by one tenant in common against another, the declaration alleges a destruction of and expulsion from the entire common property, the defendant may pay money into Court in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum*, and that it was not the plaintiff's.

DECLARATION.—For that the defendant broke and entered certain messuages, buildings, and cottages, and certain garden ground of the plaintiff, situate in the parish of Newnham Murren, in the county of Oxford, and abutting on, &c.; and then pulled down, broke down, prostrated, and totally destroyed the said messuages, buildings, and cottages, and removed all vestiges thereof, and broke down, prostrated, and totally destroyed the walls and fences of and *be-
 belonging to the garden ground and premises, and removed all [*422
 vestiges thereof, and then expelled, put out, and removed the plain-
 tiff from the said messuages, buildings, cottages, and garden ground,

and kept and continued him so expelled, put out, and amoved thenceforth, and during all that time hindered and prevented him the plaintiff from using and enjoying the said premises.

Pleas.—First: as to so much of the trespasses mentioned in the declaration as were committed upon, to, or in respect of forty-eight undivided three hundred and fifteenth parts of the said messuages, buildings, cottages, and garden ground, the defendant brings into Court the sum of 15*l.*, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Second: as to the residue of the trespasses.—That two hundred and sixty-seven three hundred and fifteenth parts of the said messuages, buildings, cottages, and garden ground, were the messuages, buildings, cottages, and garden ground, soil, and freehold of the defendant.

Third: to the said residue.—That two hundred and sixty-seven three hundred and fifteenth parts of the said messuages, buildings, cottages, and garden ground were not the plaintiff's as alleged.

Demurrer to second and third pleas, and joinder therein.

The plaintiff also replied to the second plea:—That the said messuages, buildings, cottages, and garden ground, were the messuages, buildings, cottages, and garden ground, soil, and freehold of the plaintiff and the defendant, as tenants in common thereof, in certain undivided shares; and that the defendant committed the trespasses to which the said second plea is pleaded in his own wrong, as in the declaration mentioned.

Demurrer to replication, and joinder therein.

*423] *Phipson*, for the plaintiff.—The second and third pleas *are bad. The defendant admits that he has destroyed the entire messuages, and he has no right to split his defence and justify in respect of his particular share of them. Although there is this difference between tenants in common and joint tenants that the latter are seised per mie et per tout, while the former hold by distinct titles; yet each has an individual interest in the whole subject-matter of the tenancy. In Bacon's Abridg. tit. *Joint Tenants* (A) (citing Co. Lit. 189 a), it is said: "And as the essential difference between joint-tenants and tenants in common is, that joint tenants have the land by one joint title and in one right, and tenants in common by several titles, or by one title and by several rights; this is the reason, says my Lord Coke, that joint-tenants have one joint freehold, and tenants in common have several freeholds, though this property is common to them both, viz., that their occupation is undivided and neither of them knoweth his part in several." [CHANNELL, B.—Suppose the defendant had pleaded "not guilty," would the plaintiff have been bound to prove an entire destruction of the premises?] One tenant in common cannot maintain an action against another unless there is a total destruction of the common property: *Cubitt v. Porter*, 8 B. & C. 257 (E. C. L. R. vol. 15). If a tenant in common cuts away the soil of the common property trespass will lie, because that destroys the common property: *Clayton v. Corby*, 5 Q. B. 415 (E. C. L. R. vol. 48). In *Murray v. Hall*, 7 C. B. 441 (E. C. L. R. vol. 62), where it was held that trespass quare clausum fregit would lie by one tenant in common against his co-tenant, there was an actual expulsion.

[MARTIN, B., referred to Littleton, sect. 322, 323.] Also in Com. Dig. tit. *Estates by Grant* (K 8), it is said: "If one actually ousts his companion of the possession, the other may maintain an ejectment against him." * [CHANNELL, B., referred to *Stedman v. Smith*, 8 E. & B. 1 (E. C. L. R. vol. 92).] Where the question is one of title, there is no difficulty in paying money into Court, to the extent of the damage sustained. For instance, in trespass for entering the plaintiff's close and cutting down a tree, the defendant might pay 5s. into Court, and at the trial show that the plaintiff was tenant for a term which was within one day of its expiration. Again, in detinue for a horse, the defendant might pay 1s. into Court and prove that the horse was only lent to the plaintiff for an hour. So, in this case, any limited interest of the plaintiff in the land might be shown, and he would only be entitled to recover an aliquot proportion, according to his interest, of the entire damage to the whole land. But these pleas admit that the plaintiff is possessed of an undivided portion of the messuages and land, and the defendant has no right to set up a title in himself as against the plaintiff, which is the effect of the third plea: *Jones v. Chapman*, 2 Exch. 803.† The declaration shows such a destruction of the common property as amounts to an ouster: *Wilkinson v. Haygarth*, 12 Q. B. 837 (E. C. L. R. vol. 64); *Stedman v. Smith*, 8 E. & B. 1 (E. C. L. R. vol. 92). This is a novel mode of pleading, which, if allowed, will lead to great inconvenience. The plaintiff is entitled to recover damages in respect of the destruction of the entire premises.

Gray, for the defendant.—Formerly it was doubted whether trespass could be maintained by one tenant in common against another for an actual expulsion. In *Cubitt v. Porter*, 8 B. & C. 257, 269 (E. C. L. R. vol. 15), Littledale, J., said: "If there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is a mere aggravation of *the trespass." But all doubt was removed by *Murray v. Hill*, 7 C. B. 441, 454 (E. C. L. R. vol. 62), where Coltman, J., in delivering the judgment of the Court, said: "It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle v. Tloome*, 8 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is a real foundation for the doubts suggested." Therefore trespass will lie wherever one tenant in common has so dealt with the property as to prevent the other from enjoying the whole of it, or where there has been an actual ouster. This mode of pleading may be supported on principle. If, in trespass *quare clausum fregit*, the defendant can justify the breaking and entering, he may confine his plea to that, and if the plaintiff relies on an expulsion he must new assign. So, where the locus in quo is described by metes and bounds, the defendant may plead as to one close "not guilty," and as to another *liberum tenementum*. The defendant is doing no more than that: he does not justify the trespasses, but admits them, and says that the plain

tiff has only an interest in part of the subject-matter. There is some analogy between the action of trespass and ejectment, and the more correct mode would have been for the plaintiff to have declared that he was possessed of so many undivided shares in the messuages, in the same way as in ejectment it is usual to describe the extent of the interest the plaintiff claims in the premises, as a moiety or two-thirds. Suppose a judgment in ejectment for a moiety of lands, that would be followed by an action of trespass for mesne profits, in which the plaintiff would describe the extent of his interest and the damages *426] would be limited by *that alone. If the defendant had paid money into Court without confining the payment to the trespasses in respect of the plaintiff's shares in the premises, and at the trial sought to prove the plaintiff's limited interest, the latter might contend that as he had claimed damages in respect of trespasses to the entire premises, and the defendant had paid money into Court generally, he was precluded from showing that the plaintiff was possessed of only a part of the premises. A *bonâ fide* dispute as to the extent of the plaintiff's interest could not be raised upon an issue as to whether the money paid into Court was sufficient, and therefore the defendant ought to be allowed to plead in such a manner as to show what the interest of the plaintiff really is. Suppose the trespasses had been committed by a stranger, and each tenant in common had brought a separate action, he could only have recovered in respect of his particular share: *Nelthorpe v. Dorrington*, 2 Lev. 113. The same principle applies in an action by one joint tenant against another. There is no inconvenience in this mode of pleading; for if the money paid into Court is not sufficient to cover the damage done to the plaintiff's share of the premises, he will recover more. The defendant in effect says: "So far as the trespass has injured your tenement I admit that I have no defence, and I pay money into Court; but so far as the alleged trespass affects the other tenement, you have no right of action, because it is mine." No doubt each tenant in common is seised of an undivided part of the entirety, but he is only in possession of the whole by reason of his limited interest. It is not contended that the declaration is bad, but only that the plaintiff should have limited his claim to his actual interest in the premises, and the defendant is merely doing what the plaintiff ought to have done.

Phipson replied.

*427] *POLLOCK, C. B.—I am of opinion that the pleas are good, and that the defendant is entitled to judgment. There is no precedent on the subject, but the reason is that until lately money could not have been paid into Court in such case. It is the duty of the Court, if they can, so to read the pleas as to effect the object and intention of the defendant, and I think the pleas can be so read. The defendant says: "You bring an action of trespass against me, as if you were the owner of the entire premises; and I say in the first place, with respect to your portion, I pay money into Court; and with respect to the residue I say, first, it is mine; secondly, it is not yours." What objection is there to that mode of pleading? Mr. *Phipson* says that the plaintiff, having a title to forty-eight undivided three hundred and fifteen parts, has a kind of possession of the whole. But that is only a benefit as owner of those parts; there is no right

of possession to the whole so as to get the benefit of the whole. If the plaintiff has sustained more damage than the amount paid into Court, he may reply it. There is a distinction between the right of property in the undivided shares and a right of possession to the whole. If the plaintiff goes to trial he will recover every particle of damage he has sustained, not only in respect of his undivided parts of the premises, but also for any incidental advantage in having them in connection with the other parts. For these reasons, I think that the pleas are good, and that our judgment ought to be for the defendant.

MARTIN, B.—I am also of opinion that the pleas are good. I think the question turns upon the meaning of the words “in respect of,” in the first plea. The declaration is in trespass, and it alleges that the defendant broke and entered certain messuages, buildings, &c., of the plaintiff, and pulled down, prostrated, and destroyed them, and expelled, put out, and amoved the plaintiff from them, and *kept him so expelled, put out, and amoved thenceforth, and prevented him from using the premises. It is admitted by Mr. Gray that that is a proper form of declaration, and that one tenant in common may maintain an action against another for a trespass to the common property. The pleas demurred to are the second and third, to the residue of the trespasses. In order to ascertain what is the residue of the trespasses, it is essential to ascertain what the first plea is pleaded to. It is “to so much of the trespasses mentioned in the declaration as were committed *upon, to, or in respect of* forty-eight undivided three hundred and fifteenth parts of the said messuages, buildings,” &c. If the plea had been to so much of the trespasses as were committed *upon* those undivided parts, it would have been bad; because the plaintiff, being tenant in common, has an interest in the remaining shares, and neither the word “upon” nor “to” would be sufficient, for that would limit the trespasses to the forty-eight undivided three hundred and fifteenth parts, excluding the residue. But the plea also uses the words, “*or in respect of,*” so that it speaks of trespasses affecting, or having reference to, or bearing upon, the forty-eight undivided parts. If the plea can be read in that sense, every objection is met, because, however the act of the defendant may affect the plaintiff’s shares, the defendant says that the money paid into Court is enough. Then, as to the residue of the trespasses, the defendant says that two hundred and sixty-seven three hundred and fifteenth parts of the messuages and buildings were his soil and freehold, and were not the plaintiff’s. So reading the pleas, they cover every portion of the plaintiff’s interest, and are free from objection, and I think the Judge who tries the case must read them in that sense or there will be a miscarriage.

CHANNELL, B.—I am also of opinion that our judgment should be for the defendant. The case is one of novelty, *and, for the reasons already given, it cannot be expected that any direct authority should be found; but it is satisfactory to know that in the course of the argument the principles of law which govern it were conceded on both sides. The question turns upon the construction of the pleas, and I agree with my brother Martin that we are not only at liberty, but are bound, to read the first and second pleas together; and so doing, it appears to me that the money paid into Court is in

satisfaction of all the plaintiff's interest as proprietor of the forty-eight undivided shares, and as being in possession of the entirety; and that it is a compensation for the damage his interest has sustained either in the shape of a proprietary or a possessory interest. It seems to me that the pleas are capable of being read in that way, and if so, there is no difference between the counsel on one side or the other as to their affording an answer to the action. The matter therefore resolves itself into a mere criticism upon the language of the first plea. It might have been worded differently, so as to exclude all doubt, but I think it is so worded as to entitle the defendant to judgment.

Judgment for the defendant.

BAYLEY v. GRIFFITHS. *June 17.*

Where interrogatories administered under the Common Law Procedure Act, 1854, relate as much to the plaintiff's case as the defendant's, the latter is bound to answer them, although the answers may disprove his case.

WOOLLETT had obtained a rule calling on the defendant to show cause why an attachment should not issue against him for disobedience of an order of Wilde, B., by which he was ordered to answer interrogatories. The *action was on a promissory note made by the *430] defendant for payment of 337l. 9s. 2d. to one William Bayley, and by him endorsed to the plaintiff.

The defendant pleaded: First, that he had executed a deed of arrangement under the provisions of the Bankruptcy Act, 1861, which deed having been assented to by creditors of the required number and value to make the same binding on all other creditors, was duly registered in the Court of Bankruptcy in London on or about the 25th of February, and a certificate of such filing was duly granted. Secondly, that William Bayley endorsed the promissory note to the plaintiff after he had assented to the said deed, and with the view and for the purpose of avoiding this effect of such assent, and that the plaintiff took the same with notice and without consideration.

The plaintiff joined issue on the pleas, and replied, that divers of the debts of the majority in number of the creditors who assented to the deed were contracted by the defendant fraudulently and for the sole purpose of creating a body of creditors of small amount, who should make up the majority in number required by the Act to assent to the deed; and that many of the debts were contracted to clerks and servants of the defendant by letting their wages become in arrear, it being intended to pay them, and they had been paid in full after the registration of the deed; and that without the creditors in the replication mentioned there would have been no such majority as in the plea mentioned.

On the 15th of May, 1862, the plaintiff obtained an order for liberty to deliver to the defendant the following interrogatories:—

1. What business did you carry on prior to the 20th of February, 1862; and where was your office or place of business, and where were your manufactories?

*2. Who first suggested the deed mentioned and set forth in the plea in this action; who named the trustees therein, and [*431 who applied to them to act? Are they, or is either and which of them, creditors; and if so, for what amount or amounts? Were they or either of them in your employ prior to the 20th of February, 1862, and are they, or either and which of them, now in your employ?

3. Set out when and where you executed the deed, and when and where it was executed by such trustees.

4. Was there any meeting of your creditors held prior to the 20th February, 1862? If you allege there was any such meeting, set out by whom it was called, when and where it was held, and by whom it was attended, and what passed at such meeting.

5. Who applied to the creditors for their consent or approval of the deed? Set out the names, addresses, and occupations of the persons who have assented or approved of the said deed, the date of each approval or consent, and the amount of each debt, distinguishing those persons who held security, and setting out the nature of the security held by each.

6. Have you paid to any or either and which of the persons who assented to or approved of the deed the whole or any part of the debts in respect of which they proposed so to assent or approve? If so, set out the date and the amount of each such payment.

7. Have any or either and which of the persons who assented to or approved of the deed, and at that time held security for their debts, realized or received the securities held by them, or otherwise been paid the amount of their debts? If so, set out the amounts received by each such creditor, and the date of such receipt.

8. Have any or either and which of the creditors who *as- [*432 sented to or approved of the deed received from any source whatever the whole or any part of the debts in respect of which they so assented or approved? If so, set out the names of the persons who have so received, and the date and the amount of each receipt.

9. Set out a full list of the debts and liabilities due or incurred by you prior to the 20th of February, 1862, with the names, addresses, and occupations of each of your creditors, the amount of the debts due to each, and the securities held by each.

10. Had you prior to the 20th of February, 1862, and have you now in your custody, possession, or power, or in the custody, power, or control of your attorney, solicitor, or agents, any books, ledgers, papers, letters, documents, memorandums, or writings relating to your business transactions prior to the 20th of February, 1862? If so, set out a full and perfect list of such books, ledgers, papers, documents, memorandums, or writings; and if you allege that you had any such matters prior to the 20th of February, 1862, but have since parted with them or either of them, set out when you last saw such document, where, why, and to whom you parted with it, and in whose possession it now is.

11. Set out a list of the papers or writings by which the creditors assented or approved of the deed referred to in the plea.

On the 28th of May the defendant delivered the following answers to the interrogatories:—

In answer to the first interrogatory, I say, on and prior to the 20th

February, 1862, I carried on the business of an iron-master and also of a metal broker, and my chief office or place of business was at Wolverhampton, in the county of Stafford; and my manufactories were *433] at the Windmill End *Furnaces, at Dudley, and the Britannia Ironworks at Oldbury, in the county of Worcester, &c. (naming other places).

In answer to the second and subsequent interrogatories, I say, I am not bound according to the practice of this Court to answer such interrogatories, on the ground that they seek for a discovery of my case and the evidence by which I intend to support it; and are in other respects not in accordance with the practice of the Court.

On the 10th of June, 1862, Wilde, B., made an order that the defendant do answer the second and subsequent interrogatories by eleven o'clock on the 12th of June. The defendant not having answered the interrogatories, the present rule was obtained; against which

Quain showed cause.—The real question is whether the deed of arrangement is valid. The plaintiff has replied to the first plea that the debts of the majority of the creditors who assented to the deed were contracted by the defendant fraudulently; and for the purpose of proving that replication, he seeks to administer these interrogatories. But under the traverse of that plea the defendant is bound to prove a valid deed of arrangement. The second interrogatory contains mere fishing questions, relating exclusively to the defendant's case. Interrogatories should be such as, when answered, will prove the case of the party interrogating, not disprove that of his adversary. [BRAMWELL, B.—I doubt whether you may not search a man's conscience as to his own case. MARTIN, B.—The answers to these interrogatories relate as much to the plaintiff's case as the defendant's. The plaintiff seeks to establish that the deed was not made *bonâ fide*, but fraudulently concocted; and if the jury are satisfied of that, there *434] is an end of it.] In *Hunt v. Hewitt*, 7 Exch. 236,† it was expressly laid down that a discovery can only be granted where the documents are required to enable the applicant to support his own case, not to find a flaw in his opponent's. The object of these interrogatories is not to support the plaintiff's case, but to find a defect in the defendant's. In *Wigram on Discovery*, p. 261, 2d ed., it is laid down that "the right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or to the evidence which relates exclusively to his case." In *Shadwell v. Shadwell*, 6 C. B. N. S. 679 (E. C. L. R. vol. 95), the Court refused inspection of a letter, because it was sought, not in order to support the plaintiff's case, but in order to see whether and by what means a defence could be made out against him. [BRAMWELL, B.—Why is not this case within the rule laid down by Lord Redesdale, *Redes. Plead.* 9, as to which it is said, in *Wigram on Discovery*, p. 285, 2d ed., "That a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to *know what the case is*, admits of no doubt?" MARTIN, B.—For the purpose of showing that the deed of arrangement was not signed by the requisite

number and value of creditors, might not the plaintiff put this question: "Have you not a creditor named J. T. to whom you owe 1000?"] The defendant is bound to prove a valid deed; and the only object of the question would be to discover a flaw in the defendant's case. [POLLOCK, C. B.—The plaintiff has a right to know what facts the defendant intends to prove, in order to meet them. In *Bellwood v. Wetherell*, 1 Y. & C. 211, 216,† Lord Abinger said: "Now the obvious line to be drawn is this,—that though in general *the defendant has no right to a discovery of the plaintiff's [*435 title, yet in certain cases he will be entitled to a discovery of the nature though not of the evidence of that title." This case appears to me to fall within that rule. When a defendant pleads a release, the plaintiff has a right to inspect it. So where a defendant pleads a set-off, the plaintiff has a right to know of what items it consists and their dates. I think the defendant is bound to answer these interrogatories.]

Per CURIAM.(a)—The rule must be absolute, the attachment to lie in the office for a fortnight. Rule accordingly.

(a) Pollock, C. B., Martin, B., and Bramwell, B.

REEVE v. YEATES. June 14.

To constitute an offence under the 5 Geo. 4, c. 83, s. 4, there must be a running away and deserting a wife or child, and a chargeability to a parish by reason of it. Therefore it is sufficient, under the 11 & 12 Vict. c. 43, s. 11, if the information is laid within six months of the chargeability, although the running away took place more than six months before the information was laid. Per Pollock, C. B., and Martin, B.—Dissentiente Bramwell, B.

PURSUANT to the 20 & 21 Vict. c. 43, the following case was stated by justices of the city of Worcester for the opinion of this Court:—

At a petty sessions of the peace for the city of Worcester, one Edwin Yeates was brought before the said justices, under a warrant, charged in and by a certain information, laid on the 17th of March, 1862, by Reeve, the appellant, by direction of an order of the Board of Guardians of the Worcester Union, "for that Edwin Yeates did, on the 20th day of July, 1861, run away and leave his lawful wife Eliza Yeates, whereby she the said Eliza Yeates, and her infant child, did, on the 13th day of March, 1862, become chargeable to the parish *of St. Helen, in the Worcester Poor Law Union, in the said [*436 city; and had continued and were then so chargeable to the said parish, contrary to the 4th section of the statute 5 Geo. 4, c. 83, and the said charge having been heard by us, we dismissed the said information, upon the grounds and for the reasons hereinafter stated."

At the hearing of the information, it was proved that the said Edwin Yeates did, on the said 20th of July, 1861, run away and leave his wife, Eliza Yeates, who was then resident in the parish of St. Helen, in the city of Worcester. That the said Eliza Yeates was then in part supported by her friends and in part by her labour, but ultimately, in consequence of her husband so running away, she and her infant child became, on the 13th of March, 1862, chargeable to the said parish, and were, at the time the information was laid, still so

chargeable and receiving relief therefrom; and that afterwards, on the 17th of March, the said information was laid by the said Reeve, as such officer duly authorized in that behalf.

It was then contended, by the attorney who appeared on behalf of the defendant, that the information was bad and could not be maintained, inasmuch as it was not laid within six months of the commission of the offence, as required by the 11 & 12 Vict. c. 43, s. 11; and that the offence under the Act, 5 Geo. 4, c. 83, s. 4, was the "running away," which had occurred eight months before the laying of the information.

It was advanced on the part of the informant, that the offence consisted in the "chargeability" of the defendant's wife and child to the parish of St. Helen, arising from the running away of the defendant, and not in the running away itself; and that the information was good, inasmuch as it was laid within six months of the time of such "chargeability."

*437] *We, the justices, were of opinion that the information should have been laid within six months of the date of the defendant's running away; and, not having been so laid, were of opinion that the objection must prevail, and did allow the same accordingly, and did discharge the defendant.

J. J. Powell, for the appellant.—The decision of the justices was erroneous. By the 5 Geo. 4, c. 83, s. 4, "Every person running away and leaving his wife or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place, shall be deemed a rogue and a vagabond," &c. By that Act no time is limited for making a complaint or laying an information. Then, the 11 & 12 Vict. c. 43, s. 11, enacts:—"That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." To constitute an offence within the 5 Geo. 4, c. 83, s. 4, two things must concur, a running away and a chargeability in consequence of it. Though there be a running away, there is no offence until there is a chargeability. If it were otherwise, a man who deserted his wife might evade the Act by leaving her sufficient maintenance for six months. [BRAMWELL, B.—According to that argument, if a man deserted his wife, but left her abundant means to support herself for twenty years, and at the end of that time she became chargeable to the parish, he would have committed the offence within six months. The result would be that a man *438] might be punished for a perfectly innocent act. *MARTIN, B.—The Act says, "every person running away and leaving his wife, &c., chargeable," that is, at the time of running away, "or whereby she shall become chargeable;" therefore until she has become chargeable there is no offence.] Here the matter of complaint did not arise when the defendant ran away and left his wife, because she was then supported partly by her friends and partly by her own labour, but only when she became chargeable in consequence of that running away.

No person appeared for the respondent.

MARTIN, B.—I regret that there should be any difference of opinion between my brother Bramwell and myself, but I own it seems to me that the case is clear. The statute, 5 Geo. 4, c. 83, s. 4, which creates the offence, enacts that “every person running away and leaving his wife or his or her child or children chargeable.” Therefore in order to create the offence two things must concur, viz., a running away, that is, going away from a wrong motive and with the intention of deserting and leaving chargeable a wife or children. If a person does that, he commits an offence. The statute then proceeds to say: “or *whereby* she or they, or any of them, *shall become* chargeable.” Therefore they must become chargeable by reason of the running away, and the offence is not complete until they become chargeable. The question is, whether this information, which was laid within six months after the chargeability but more than six months after the running away, was in time, within the meaning of the 11 & 12 Vict. c. 43, s. 11, which requires any complaint or information to be laid “within six calendar months from the time when the matter of complaint or information respectively arose.” For the reasons already *given, I think that the matter of complaint or information only arose when the defendant’s wife became chargeable to the parish.^(a) [*439

BRAMWELL, B.—I am of a different opinion. The question is, whether the matter of complaint and information arose within six calendar months. Now what was the matter of complaint? In my opinion it was the “running away,” that being attended with certain consequences. It is true that when it took place no one could tell whether there would be an offence, because that depended on something which might or might not happen; but when the event happened which made the “running away” an offence, it became an offence at the time when it took place. If that were otherwise, although a pardon was granted for all offences committed within six months, a man might be punished if the chargeability was not within that period, notwithstanding the “running away” was, and although no offence was committed when he did the act, and at the time it could not be predicated whether or no any offence would ever be committed. But, as my brother Martin and the Lord Chief Baron are of a different opinion, the determination of the justices must be reversed.

Determination of justices reversed.

(a) His lordship stated that the Lord Chief Baron, who had left the Court, was of the same opinion.

*MARY KENDALL, Executrix of ALFRED KENDALL, [v. WEBSTER. June 11. [*440

To an action by a trustee, on a deed of separation between husband and wife, for non-payment by the husband of the wife’s annuity, it is no defence, on equitable grounds, that the husband and wife were induced to live apart by the undue influence, persuasion and threats of the trusted, who unlawfully harboured the wife; and that, at the time the deed of separation was executed, the wife was pregnant, of which fact she and the trustee kept the husband in ignorance, and thereby induced him to execute the deed; and that he has always been willing to receive back and cohabit with his wife.

DECLARATION.—That by an indenture, dated, &c., between the defendant of the first part, Mary Webster, the wife of the defendant, of the second part, and Alfred Kendall of the third part (and which was duly executed by, and was and is the deed of the defendant and the said Alfred Kendall; reciting, that on account of incompatibility of temper, and for divers causes and considerations, the defendant and Mary Webster had agreed to live separate and apart from each other upon the terms and conditions thereafter contained, and the said Alfred Kendall had concurred in and approved such terms and conditions. And that there was issue of the marriage of the defendant and Mary Webster one child only, namely, John Webster, an infant of eleven months old: It was witnessed, that in pursuance and performance of the said agreement on the part of the defendant, he, the defendant, did thereby, for himself, covenant and agree with the said Alfred Kendall, his executors, administrators, and assigns, in manner following, that is to say: that notwithstanding the marriage which had been had and solemnized between the defendant and Mary Webster, it should be lawful for her, the said Mary Webster, from thenceforth and at all times thereafter to live separate and apart from the defendant, in the same manner as if she was sole and unmarried, in any part of Great Britain or elsewhere she might think proper, in such way as she might think fit; and that the defendant would not compel or seek to compel her to cohabit or live with him by any proceeding instituted in any Court or otherwise *441] *howsoever. And also, that she, the said Mary Webster, should absolutely be free from all command, restraint, or authority of the defendant, who should not from thenceforth under any pretence whatsoever prosecute or sue any person or persons whomsoever for harbouring, protecting, or assisting the said Mary Webster, or in any way interfere with or disturb her in her way of living or in her liberty of going to, remaining in, or returning from such place or places as she might think proper. And also, that the defendant should and would permit the said Mary Webster to have the sole charge, custody, care, and education of the said John Webster, so long as the said Mary Webster should without expense to the defendant maintain, support, lodge, clothe, and educate the said John Webster, but subject to such right of access by the defendant to the said John Webster as was thereafter provided and covenanted for. And further, that he, the defendant, should and would yearly and every year, during the joint lives of himself and the said Mary Webster, pay unto the said Alfred Kendall, his executors, &c., the yearly sum of 40*l.*, by twelve equal monthly instalments, on the fourteenth day of each and every month in each year without any deduction or abatement whatsoever, the first of such monthly payments to be made on the 14th day of June, 1860. And it was thereby declared and agreed by and between the parties to that deed, that the said Alfred Kendall, his executors or administrators, should stand possessed of the said yearly sum of 40*l.* so covenanted to be paid as aforesaid, when and as the same should be received, upon trust to pay the same into the proper hands of the said Mary Webster for her sole and separate use, free from the debts, control, or engagements of the defendant, but without power for her to lien or anticipate the growing or future payments thereof,

and to be applied for and towards the maintenance and support of herself and *the maintenance, support, education, and clothing of the said John Webster. And that indenture further witnessed, that in pursuance of the said agreement on the part of the said Alfred Kendall, and in consideration of the covenants therein before contained on the part of the defendant, he, the said Alfred Kendall, did thereby, for himself, his heirs, executors, and administrators, covenant and agree with the defendant in manner following, that is to say: that during all such time as the defendant and Mary Webster should continue to live separate and apart from each other, the defendant should not be in any manner liable to pay for the maintenance, support, lodging, or clothing of the said Mary Webster; or the maintenance, support, lodging, clothing, or education of the said John Webster; or to pay any debt or debts the said Mary Webster should or might at any time or times thereafter contract during the said separation. And also, that the said Alfred Kendall, his heirs, executors, or administrators, should and would from time to time and at all times thereafter well and sufficiently protect, defend, and save harmless, and keep indemnified the defendant, his heirs, executors, and administrators, and his and their lands, tenements, goods, and chattels of, from, and against all and every the debt or debts, sum or sums of money which the said Mary Webster should or might at any time thereafter during the said separation contract with any person or persons whomsoever, and also of, from, and against all actions, suits, claims, and demands on account thereof; and also of, from, and against all such costs, damages, and expenses as might be recovered against or sustained or expended or become payable by the defendant, his heirs, executors, or administrators, through or on account or by reason of the non-payment by the said Mary Webster of any such debt or sum of money. And also, that the said Mary Webster, or any other person or persons on her behalf, *should not nor would at any time or times thereafter commence or prosecute any suit or suits, or any other proceedings in any Court or Courts whatsoever, to compel the defendant to cohabit or live with the said Mary Webster, or to allow her any support, maintenance, or alimony whatsoever. And also, that she, the said Mary Webster, should and would duly and properly support, maintain, lodge, clothe, and educate the said John Webster until he should attain the age of nine years, provided the defendant and the said Mary Webster should both so long live. And also, that the said Mary Webster should and would, at least once in every week for the space of two hours, between the hours of one and ten of the clock in the afternoon, and at all other reasonable times when the said John Webster should be afflicted with serious illness, permit the defendant to have access to the said John Webster unmolested by the said Alfred Kendall. And also, that the said John Webster should not, without the license in writing of the defendant, for a longer space of time than one month in each year whilst he remained under nine years of age, be removed to a greater distance than ten miles from the General Post Office, London. Provided always, and it was thereby declared, that in case any monthly payment of the said yearly sum of 40*l*. should be in arrear and unpaid for the space of three calendar months after any

day upon which, according to the true intent and meaning of the said deed, it ought to be paid, having been demanded, then and immediately after the expiration of the said space of three calendar months, the covenants thereinbefore contained on the part of the said Alfred Kendall, his heirs, executors, and administrators; should determine and be void.—Breach: that although the said Mary Webster and John Webster are both living, and all things have been done and happened and existed, and all times elapsed requisite to entitle the *444] said Alfred Kendall *and the plaintiff, as executrix as aforesaid since his death, to have the instalments or monthly payments on account of the said annuity or sum of 40*l.* hereinafter mentioned to be unpaid, paid before this suit, yet the defendant has not paid the said annuity or yearly sum in manner aforesaid, &c.

Plea on equitable grounds.—That before and up to the time of the execution of the said deed, the said Mary Webster, the defendant's wife, was living with the said Alfred Kendall (who was her father), separate and apart from the defendant her then husband without his consent and against his will, as the said Alfred Kendall then well knew; and the said Alfred Kendall without the defendant's consent unlawfully harboured his said wife, and the defendant thereupon repeatedly before the execution of the said deed endeavoured to induce the said Mary Webster, his wife, to return to his, the defendant's house, and to resume cohabitation with the defendant as his wife, as the said Alfred Kendall then also then well knew; and the said Alfred Kendall by means of such harbouring and by undue influence, threats, and persuasions, induced the said Mary Webster, the defendant's said wife, who was willing to return to the defendant's said house and to resume cohabitation as aforesaid, to refuse to and not to return to the defendant's said house and resume such cohabitation as aforesaid, and to insist upon continuing to live apart from the defendant her said husband, and to demand of the defendant the execution of the said deed in the declaration mentioned, in order to enable her so to continue to live separate and apart; and the said Alfred Kendall by such unlawful harbouring of the defendant's said wife, and by so inducing her by undue influence, threats, and persuasions to continue to live separate and apart from the defendant her said husband, and to refuse to return to his house and to cohabitation with him as *445] aforesaid, prevailed upon and induced the defendant *and his said wife to execute the said deed as they otherwise would not have done; and the said Mary Webster was induced to consent to the said deed and to execute the same, and to require the execution thereof by the defendant, by the undue influence, persuasion, and threats of the said Alfred Kendall, who so then unlawfully harboured the said Mary Webster and prevented her from returning to the house of the defendant and to cohabitation with him as aforesaid; and the defendant by such refusal of the said Mary Webster to return to his house and to such cohabitation as aforesaid, and by her so requiring the execution by him of the said deed as aforesaid, so unlawfully brought about by the said Alfred Kendall as aforesaid, was induced to execute the said deed, as he otherwise would not have done. And the said Alfred Kendall, by the means aforesaid, unlawfully endeavoured to bring about, and did bring about, the separation of the

defendant and his said wife by means of the said deed; and but for the aforesaid unlawful conduct of the said Alfred Kendall the said deed never would have been executed by the defendant or his said wife, nor would they have become separated thereby or thereunder, and the defendant's said wife would have returned to his house and to cohabitation with him as aforesaid. And the defendant further saith that, before and at the time of the execution of the said deed by the defendant, the said Mary Webster was pregnant with a child by him the defendant, her said husband, whereof she was afterwards delivered, of which said pregnancy he the defendant at the time of the execution of the said deed was wholly ignorant, or he would not have executed the said deed, which said pregnancy was well known to the said Alfred Kendall and to the said Mary Webster, the wife of the defendant, and they also well knew that he, the defendant, was ignorant of the same, and that had he known the same he would not have *executed the said deed; and the said Alfred Kendall persuaded and induced the said Mary Webster not to inform the [446 defendant of the said pregnancy lest he, the defendant, should not execute the said deed, and the said Alfred Kendall and the said Mary Webster agreed to keep the defendant in ignorance, and they did keep the defendant in ignorance of the said pregnancy until after the execution of the said deed, in order that the defendant might be induced by such ignorance, and he was induced by such ignorance, to execute the said deed. That at the time that he and his said wife and the said Alfred Kendall executed the said deed, which recited that there was issue of the marriage of the said defendant and Mary his wife one child only, namely, John Webster, an infant of eleven months old, he, the defendant, supposed and believed, and the said Alfred Kendall and Mary Webster knew that he supposed and believed, that the said Mary Webster was not pregnant of any other child, whereas the said Alfred Kendall and Mary Webster then well knew that she, the said Mary Webster, was then pregnant of another child by him, the defendant her said husband; and the defendant was thereby induced to make and execute, and did make and execute the said deed by the means aforesaid, as he would not otherwise have done. And the defendant also says, that during all the time that the said alleged arrears of the annuity were accruing due, and at the time of the making and executing of the said indenture, and at all times thereafter and hitherto, the defendant was and has been ready and willing and offered, and still is ready and willing to receive back his said wife and children to his house, and to maintain them and cohabit with his said wife as her husband, whereof his said wife and the said Alfred Kendall and the plaintiff, during all the time aforesaid, had notice; but the said Alfred Kendall and the plaintiff, during all the times aforesaid, prevented the *defendant's said wife and children from returning to the defendant, and they during all those [447 times against the will of the defendant remained living apart from him.

Demurrer, and joinder therein.

Phipson, in support of the demurrer.—The facts alleged in the plea afford no defence to the action, either at law or in equity. [POLLOCK, C. B.—Is there any authority that under these circumstances a Court of equity would set aside the deed?] None can be found. The

authorities relating to deeds of separation are collected in *Roper on Husband and Wife*, vol. 2, p. 269, 2d ed., and *Bright on Husband and Wife*, vol. 2, p. 313. A Court of equity, in decreeing specific performance of a deed of separation, does not inquire into the cause of the separation: *Wilson v. Wilson*, 1 H. L. 538; 5 Id. 40. Where the separation is for the lives of the parties, the offer of the husband to take back his wife will not determine her separate allowance, since it is founded on an express contract, and therefore requires the same mutual agreement to dissolve it: *Roper on Husband and Wife*, vol. 2, p. 314, 2d ed. Where the deed of separation is between the husband and wife and a third party acting for the wife, she has the same right as any other cestui que trust to enforce the execution of a trust created in her favour: *Roper on Husband and Wife*, vol. 2, p. 296, 2d ed. It will be said that there was an equitable fraud in the concealment of the wife's pregnancy, but apart from the difficulty of supposing that the trustee, who has indemnified the husband against his wife's debts, obtained the deed fraudulently, the answer is, that fraud would not render the deed void, but voidable only.

The Court then called on

*448] **Morgan Lloyd*, for the defendant.—Agreements for separation of husband and wife have always been considered as against public policy, since they destroy all the duties and obligations of the marriage contract, not only as respects themselves but their children also. The doctrine laid down in *Westmeath v. Westmeath*, 1 Dow. N. S. 519, 544, still prevails, viz., that a deed between husband and wife for future separation cannot be supported. But upon that doctrine has been engrafted this qualification, that where differences exist between husband and wife, they may covenant for immediate separation, and such a covenant will be enforced at law or in equity, though considered illegal by the Divorce and Matrimonial Court: *Mortimer v. Mortimer*, 2 Hagg. C. C. 318. It is an established rule in equity that family arrangements cannot be supported unless there has been a full disclosure of all material circumstances: *Gordon v. Gordon*, 3 Swanst. 400. The defendant, when he entered into the contract, supposed that the issue of his marriage was one child only, and that his wife was not pregnant. That fact was concealed from him, and thereby he was induced to execute the deed. [POLLOCK, C. B.—The defendant was willing to sign a deed of separation, having an only child eleven months old; why should it be supposed that he would have been unwilling to sign it if he had known that he was likely to have another child?] The deed provides that the defendant shall have access to his child, and that he shall not be liable for its maintenance, but there are no such provisions in respect of the child unborn. The facts disclosed by the plea amount to a conspiracy between the plaintiff and the defendant's wife to keep him in ignorance of her pregnancy, in order that he might be induced to execute the deed. [MARTIN, B.—If the defendant means to impute *fraud, why not say so?] The statements in the plea show a fraud in equity, if not at law. At all events, the declaration is bad. By this deed the defendant and his wife are not only compelled to live apart so long as they live, but he may live in such a way as she may think fit, absolutely free from

all restraint and authority of her husband. That clause is clearly against public policy, because it enables the wife, if she thinks fit, to live in a state of adultery, or at a house of ill fame. [POLLOCK, C. B.—If those circumstances had happened, I do not say what would be the consequence, but they have not. MARTIN, B.—Is not this deed in the ordinary form; and must it not be assumed that the wife will conduct herself properly? CHANNELL, B.—Though the contract may be illegal in some respects, the covenant to pay the money may be good.] Where there are independent covenants, a deed may be good in part and bad in part, but where the covenants are mutual and go to the whole consideration on both sides, if any one is illegal the deed is altogether void.

Phipson, in reply.—A stipulation, in a deed of this kind, though illegal, does not avoid a covenant by the husband with a trustee to pay money for the wife's maintenance. In *Worrall v. Jacob*, 3 Meriv. 256, 268, Sir W. Grant, M. R., said: "The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law. It has, however, been held that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of and relate to that unauthorized state of separation in *which the husband and wife have endeavoured to place themselves." The consideration for the husband paying money for his wife's maintenance is the covenant by her trustees to indemnify him against his wife's debts: *Roper on Husband and Wife*, vol. 2, p. 296, 2d ed.; *Wilson v. Wilson*, 14 Sim. 405. A contract induced by fraud is not void, but voidable at the option of the party defrauded; and where he has received a benefit under it, so that the parties cannot be restored to their original condition, he has no right to rescind it: *Clarke v. Dickson*, E. B. & E. 148 (E. C. L. R. vol. 96). "A deed cannot be avoided on the ground of a fraudulent misrepresentation, unless the matter misrepresented was a material inducement to the execution of the deed; in other words, unless the matter was such as, in case of a simple contract, would be substantially the consideration for the contract:" per Erle, J., in *Mallalieu v. Hodgson*, 16 Q. B. 689 (E. C. L. R. vol. 71). In *Geddes v. Pennington*, 5 Dow. 159, it was held that a false representation as to the place from which a horse came did not invalidate the sale.

PER CURIAM.(a)—We are all of opinion that the plaintiff is entitled to judgment.

Morgan Lloyd then applied for leave to amend, by alleging fraud, which was refused. Judgment for the plaintiff.

(a) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

*451] *DAVIES, Executor of ELIZABETH DAVIES, deceased,
v. DAVIES. June 11.

After counts by the plaintiff, as executor, for an excessive distress and for distraining for more rent than was due, the declaration proceeded thus:—"And the plaintiff as such executor as aforesaid, also sues the defendant for money paid by the plaintiff as such executor as aforesaid, for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff as such executor as aforesaid claims 50*l*."—Held, on demurrer, that the declaration was bad for misjoinder.

DECLARATION.—For that the said Elizabeth Davies, during her lifetime, was tenant to the defendant of a certain messuage at a certain rent, payable by the said Elizabeth Davies to the defendant; and the defendant, after the death of the said Elizabeth Davies, wrongfully distrained for certain arrears of the said rent, goods belonging to the plaintiff as such executor as aforesaid, of much greater value than the amount of the said arrears and of the charges of the said distress and of the appraisement and sale thereof, although part of the said goods were then of sufficient value to have satisfied the arrears and charges, and might then have been distrained by the defendant for the same; and the defendant thereby made an excessive and unreasonable distress for the said arrears, contrary to the statute in such case made and provided.

And for that the defendant wrongfully seized and took the said goods and chattels of the plaintiff, as such executor as aforesaid, as a distress for certain arrears of rent, to wit, the sum of 11*l*., then claimed and pretended by the defendant to be due and in arrear for rent of the said premises, and wrongfully remained in possession of the said goods and chattels, under colour of the said distress, until the plaintiff, as such executor as aforesaid, was compelled to pay and did pay to the defendant the said pretended arrears of rent and a further sum, to wit, the sum of 15*s*. 6*d*., for the costs and charges of the said distress, in order to regain possession of the said goods and chattels: whereas at the time of the making of the said distress, and during all the time aforesaid, part only, the sum of 10*l*., of the said *452] *pretended arrears of rent so distrained for, was due to the defendant for rent of the said messuage.

And the plaintiff, as such executor as aforesaid, also sues the defendant for money paid by the plaintiff, as such executor as aforesaid, for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff, as such executor as aforesaid, claims 50*l*.

Demurrer, and joinder therein.

Murray, in support of the demurrer.—(He argued, first, that the second count did not disclose any cause of action, citing *Glynn v. Thomas*, 11 Exch. 870;† *Stevenson v. Newnham*, 13 C. B. 285 (E. C. L. R. vol. 76): secondly, that the counts for money paid and received were bad for not showing a present debt, citing *Place v. Potts*, 8 Exch. 705;† *Wilkinson v. Sharland*, 10 Exch. 724.†)—Thirdly, the declaration is bad for misjoinder. The counts for money received and money due on an account stated disclose causes of action which accrued to the

plaintiff in his own right, and they cannot be joined with causes of action which accrued to him in his representative character. The 41st section of the Common Law Procedure Act, 1852, does not allow the joinder of causes of action where they are in different rights. The test is whether the money recovered on each of the counts would be assets; if so, they may be joined. It is not enough to say that the debts accrued to the plaintiff "executor" or "being executor," but it must be averred that they accrued to him "as executor:" Williams on Executors, vol. 2, p. 1698, 5th ed. In *Lancefield v. Allen*, 1 Bligh. N. S. 592, a count stating that the defendants had accounted with the plaintiffs, "executors as aforesaid," was joined with counts stating promises *to the testator, but the objection was not taken until after judgment, and it was held that if there was any [*453 misjoinder it was cured by the verdict.

McDonnell, contrà.—(He argued, first, that although, on the authority of *Glynn v. Thomas*, 11 Exch. 870,† in order to support the second count actual damage must be proved, the count was good on demurrer. Secondly, that the indebitatus counts were good, although the words "for money payable by the defendant to the plaintiff" were omitted; that *Fagg v. Nudd*, 3 E. & B. 650 (E. C. L. R. vol. 77), was an express authority that a count on accounts stated is sufficient, although it does not contain those words; and that by the 91st section of the Common Law Procedure Act, 1852, the legislature had provided that "nothing therein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity.")—Thirdly, there is no misjoinder. Reading the declaration with its commencement and conclusion, no one can doubt that the plaintiff is suing in his character of executor. *Lancefield v. Allen*, 1 Bligh. N. S. 592, is an authority in point.

Murray replied.

POLLOCK, C. B.—We are all of opinion that the demurrer must be allowed for misjoinder; but the plaintiff may have leave to amend on the usual terms.

MARTIN, B., BRAMWELL, B., and CHANNELL, B., concurred.

Amendment accordingly; otherwise judgment for the plaintiff.

***MCCREIGHT, Official Manager of The STATE FIRE INSURANCE COMPANY, v. STEVENS.** June 16. [*454

To an action commenced by a Joint Stock Company and continued by the official manager under the Winding-up Acts, for calls on shares held by the defendant in the Company, he pleaded that he was induced to become the holder of the shares by fraud, and within a reasonable time after he had notice of the fraud, and before he received any benefit from the contract, he repudiated it.—Held, that the plaintiff was entitled to particulars of the acts of fraud and repudiation.

THIS was an action commenced by a Joint Stock Company, called "The State Fire Insurance Company," and continued by the official manager, under the Winding-up Acts, 1848, 1849. The declaration stated, that the defendant as holder of 100 shares in the Company,

was indebted to the Company in the sum of 50*l.* for instalments of capital then due and payable by him in respect of the said shares.

The defendant pleaded (with "never indebted") that he was induced to become the holder of the said shares and to contract as in the declaration mentioned by the fraud of the said Company; and within a reasonable time after he first had notice of the said fraud, and before he had received any benefit as such holder or under the said contract, he repudiated the same, and disclaimed being such holder, and has never at any time received any benefit from the said shares, or from being such holder.

Murray had obtained a rule calling on the defendant to show cause why he should not deliver to the plaintiff's attorney or agent particulars in writing of the acts of fraud relied upon by the defendant in support of his plea, and the acts constituting the repudiation and disclaimer relied upon in support of the same plea, or why the order allowing the plea should not be rescinded.^(a)—The affidavit of the *455] plaintiff, in support of the application, stated, that "the defendant appears by the books of the Company to have become a shareholder therein, and to have been treated as such by the said Company; and to have executed the deed of settlement of the Company in respect of 100 shares on the 17th September, 1855: that deponent has no knowledge of what the fraud is that the defendant intends to allege in support of such plea, or in what way the defendant intends to make out the same; neither is there among the books and papers of the Company anything that will give deponent any information on the subject: that he has no present personal knowledge of the transactions of the Company prior to his appointment as official manager thereof, and does not know on what ground the defendant will endeavour to support such plea of fraud: that the defendant does not appear from the books and papers of the Company, so far as the deponent has been able to ascertain, ever to have repudiated the shares held by him therein, and deponent has no knowledge in what way the defendant intends to make out, in support of his said plea, that he has repudiated the shares held by him in the said Company, or of what the acts of repudiation are on which he relies."

There was also the affidavit of the secretary of the Company previous to the winding-up order, who deposed that he "had never heard any statement or suggestion made by any person whomsoever that the defendant had been induced to take shares in the Company by fraud, and deponent was not aware of anything which would give a pretence for such a plea: that defendant never to deponent's knowledge repudiated being a shareholder; and that deponent was not aware of any acts or circumstances which he could allege to justify an allegation by him of having repudiated being a shareholder in the Company."

*456] *Philbrick* now showed cause.—This is not a case in which the plaintiff could administer interrogatories or have a discovery, and therefore he is not entitled to particulars. Whether in equity a discovery can be had of matters which relate solely to the defendant's case, is not clearly established; but Courts of law have

(a) A similar application had been made to Bramwell, B., at Chambers, who refused an order, and suggested an application to the Court.

considered that a party has no right to interrogate as to matters which relate exclusively to the case of his opponent. It may be said that this is an action by an official manager, who can know nothing of the alleged fraud; but the plaintiff is not in a worse position than if the Company were suing. Suppose there had been no winding-up order, and the action had been carried on by the Company, the fact that the defendant had been induced to become the holder of the shares by the fraud of any one of the directors would be a defence, although the Company had no knowledge of it. This is an attempt to obtain a discovery as to whether the defendant has any and what grounds for supporting his plea. An order for the delivery of the particulars sought for would be in effect an order upon the defendant to disclose his case before trial. [MARTIN, B.—The defendant is not asked by what proof he intends to support his plea; all that the plaintiff wants is a bonâ fide statement of the nature of the fraud.] The application is novel and without precedent. [MARTIN, B.—I have made orders of the kind at Chambers, either absolutely or as a condition for allowing the plea. BRAMWELL, B.—When the case was before me two difficulties occurred to my mind. One was, that the application was novel, but it now appears that it is not; the other was, how to enforce the order.] [Murray.—The rule is in the alternative, to disallow the plea.] [BRAMWELL, B.—If the only plea had been that of fraud, it could not have been got rid of in that way.]

Murray was not called upon to support the rule.

*POLLOCK, C. B.—We are all of opinion that the rule should be absolute. [*457]

MARTIN B., and BRAMWELL, B., concurred.

Rule absolute.(a)

(a) See *Pitts v. Chambers*, 1 F. & F. 684.

THE ATTORNEY-GENERAL v. PARTINGTON. June 17.

Probate duty is payable in respect of interest which has accrued between the time of the death of an intestate and the grant of administration, whether such interest is due by contract or recoverable in the nature of damage.

In 1819 S., a widow, died intestate, and the Solicitor of the Treasury took out administration to her estate, and received under it 23,821*l*. In 1823 I. C., the wife of E. C., applied to the Crown, claiming to be next of kin of S., but died in 1825 without establishing her claim. In 1830 E. C. died intestate without having taken any steps to recover the money, and without having administered to his wife. In 1855 administration to the estate of I. C. and the estate of E. C., on behalf of their children, was granted to P., who instituted a suit in equity to administer the estate of S., when it was found that I. C. was the sole next of kin of S., and it was ordered that the Solicitor of the Treasury pay to P., as the representative of I. C., the money in his hands with interest at 4*l*. per cent., which amounted to 34,124*l*.—Held: First, that probate duty was payable upon the value of the estate of I. C., as increased by the interest, at the time administration was granted.

Secondly, that no probate duty was payable in respect of the estate of E. C.

By consent and order of a Judge, under the 22 & 23 Vict. c. 21, s. 10, the following case was stated, without pleadings, for the opinion of this Court:—

1. In 1819 Mrs. Frances Shard, widow, died intestate, leaving per-

sonal assets to a considerable amount, and upon her death the Crown, by Mr. Maule, the then Solicitor of the Treasury, took out administration to the estate.

2. The property of the intestate, at the time of her death, consisted of the sum of 16,000*l.*, 4 per cent. bank annuities, cash in the house 210*l.* 4*s.*, and a leasehold house in Harley Street, together with the furniture, &c., therein, and a leasehold-house called Torbay-House, at Peignton, in the county of Devon, together with the furniture, plate, linen, china, and carriages, and which were sold by Mr. Maule.

The following is the account of his receipts:—

	£	s.	d.
May - 1819.—Cash in the house - - - - -	210	4	0
Sundry articles of jewellery - - - - -	80	0	0
February 1823.—Proceeds of sale of furniture, carriages, &c. -	4,153	9	7
Proceeds of sale of lease of house, fixtures, and furniture in Harley Street - - - - -	3,030	10	4
January - 1824.—Proceeds of sale of 16,000 <i>l.</i> , 4 per cent. bank annuities - - - - -	16,300	0	0
1829.—Proceeds of sale of house at Torbay, and fixtures therein - - - - -	280	0	0
Total estate of Frances Shard at the time of her death - -	24,054	3	11
Payments made by Mr. Maule during his administration, up to August, 1829, when Torbay house was sold - -	3,432	19	6
Balance -	£20,621	4	5

3. Mr. Maule also received, in February, 1823, 2560*l.* for dividends on the 16,000*l.* 4 per cent. up to 15th October, 1822, and 640*l.*, one year's further dividend, due October, 1823, making a total of 3200*l.*, which, added to the 20,621*l.*, makes a total of 23,821*l.* 4*s.* 5*d.*

4. Isabel Cook, the wife of Ellis Cook, both of whom were domiciled and had always resided in the United States of America, about the year 1823 applied to the Crown, claiming to be next of kin; her claim was not recognised, and she died in 1825 without taking any steps to establish her claim.

5. The estate of Mrs. Shard, at the time of the death of Isabel Cook, was as follows, no interest having been received by Mr. Maule upon moneys which had come to his hands:—

	£	s.	d.
The balance set forth - - - - -	23,821	4	5
Deduct legacy duty on same at 6 per cent. - - -	1,417	5	7
	£22,403	18	10

*459] *6. In the year 1830 the said Ellis Cook died intestate without having taken possession of or taken any steps to recover the money in the hands of Mr. Maule, and without having administered to his wife. After the death of their father, the children of Mr. and Mrs. Cook, who have always resided and been domiciled in the United States, applied to Mr. Partington, the defendant in this case, to take proceedings to recover the money from the solicitor of the Treasury, which he proceeded to do, and, a personal representative to Isabel Cook's estate being necessary, a power of attorney was made by James Cook, one of the said children of Isabel Cook and Ellis

Cook, authorizing the defendant, Charles Partington, to take out administration to the estates of both Ellis Cook and Isabel Cook.

7. A grant of administration to Ellis Cook's estate was accordingly made by the Prerogative Court of Canterbury to Mr. Partington on the 23d day of July, 1855. It contained the following clause:—"We do grant full power and authority to you to administer and faithfully dispose of the said goods, chattels, and credits, which, whilst living, and at the time of his death, did any way belong to his estate; and we do constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, for the use and benefit of the said James Cook, now residing at Brandon, in Vermont, in North America, and until he shall apply for and obtain letters of administration of the goods of the said deceased to be granted to him." The assets were sworn under 20l.

8. On the same day a grant of administration to the estate of Isabel Cook, the wife of Ellis Cook, was made to the defendant Charles James Partington, for the use and benefit of James Cook. It contained the following clause:—"We do grant full power and authority to you to *administer and faithfully dispose of the said goods, chattels, and credits, which whilst living, and at the time of her decease, [460 did any way belong to her estate, and we constitute you administrator of all and singular the goods, chattels, and credits of the said deceased for the use and benefit of James Cook, now residing in Vermont, in North America, one of the natural and lawful children of the said Ellis Cook, deceased, and until he shall duly apply for and obtain letters of administration of the goods of the said Ellis Cook to be granted to him, the said Ellis Cook having survived the said deceased, but died without having taken upon him letters of administration of her goods, chattels, and credits." The assets were sworn under 20l.

9. A suit was instituted in the Court of Chancery under the title of Partington v. Reynolds, by summons taken out before Vice-Chancellor Kindersley (the defendant in this case, as the personal representative of the said Isabel Cook, being the plaintiff), to administer the estate of the said Frances Shard, and an order was made therein on the 8th day of November, 1855, referring it to the chief clerk to inquire who were the next of kin of Frances Mary Shard according to the Statute of Distributions, and directing an account to be taken of the personal estate and effects of the said Frances Mary Shard.

10. The chief clerk, on the 26th of June, 1857, by his separate certificate, found that Isabel Cook was the sole next of kin of the said intestate, Frances Shard, and by his general certificate, filed 30th March, 1858, he certified, inter alia, that George Maule, Esquire, the late Solicitor of the Treasury, as administrator of the said Frances Shard, received personal estate of the said intestate to the amount of 27,317l. 19s. 1d., and that the said George Maule paid, and the defendant Henry Revell Reynolds, as the present *Solicitor of the Treasury and successor to the said George Maule, was entitled [461 to be allowed on account thereof sums to the amount of 3432l. 19s. 6d., leaving a balance due from the said Henry Revell Reynolds as such successor as aforesaid of 23,884l. 19s. 7d. on that account, and he further found that the personal estate consisted of the before-men-

tioned balance of 23,884*l.* 19*s.* 7*d.*, and that there was not any personal estate then outstanding.

11. A summons was taken out for further consideration, with the view, amongst other things, of charging the solicitors for the Crown with interest on the aforesaid balance of 23,884*l.* 19*s.* 7*d.*, but it was adjourned into Court and came on to be heard before the Vice-Chancellor on the 26th June, 1858, when the Court, by an order dated the said 26th June, 1858, declared that Mr. Reynolds ought to be charged with interest at 4 per cent. per annum on all sums, in respect of the estate of Frances Shard, from time to time retained by him and by the said Mr. Maule, and directed an inquiry to be made as to what balances he had retained in his hands from time to time, and to calculate the amount of interest at the rate of 4 per cent. per annum. It having been suggested that, as the Court had decided the principle, the parties could fix the amount of interest without the reference, and that it would amount, on the basis of his Honor's decision, to 34,124*l.*, the Court declared that to be the amount which ought to be charged, and ordered it to be paid by the defendant, Henry Revell Reynolds, to the said Charles James Partington, as the representative of the said Isabel Cook.

Of this sum 1190*l.* was in respect of the time antecedent to Isabel Cook's death, and *l.* represented the time subsequent to that event, and up to the date of the said letters of administration. The *462] Court also directed the *taxation of costs of the plaintiff and defendant in the suit and ordered the same to be paid out of the sum of 24,528*l.* 17*s.* 2*d.*, 3 per cent. consols, in which, under a previous order made in the said cause, the said balance of 23,884*l.* 19*s.* 7*d.* had been invested. The Court also ordered that the deficient duty on the letters of administration to Isabel Cook, and the legacy duty on the residue of the intestate Frances Shard's estate (the amounts respectively to be verified by affidavit) should also be paid out of the said stock, and the ultimate balance, after the payments in the order mentioned, together with any dividends which might accrue on the stock, was ordered to be transferred and paid to the plaintiff, Charles James Partington, as the personal representative of the said Isabel Cook.

12. The total amount of costs taxed under the said order was 3395*l.* 0*s.* 3*d.*, and the legacy duty on the residue 3282*l.* 17*s.* 1*d.*; a further sum of 525*l.* was paid to Mr. Ewbank, as the solicitor for the administrator, for the purpose of paying the probate or administration duty on Isabel Cook's estate, and the balance, amounting to 17,055*l.* 1*s.*, 3 per cent. consols, and 364*l.* 5*s.* 4*d.* cash, was transferred and paid to the plaintiff, Charles James Partington.

13. The residuary account of Frances Shard's estate was made out and passed, and the legacy duty, amounting to the aforesaid sum of 3282*l.* 17*s.* 1*d.*, paid.

14. Mr. Partington then applied to the Commissioners of Inland Revenue to put additional duty on the administration granted to him of Isabel Cook's estate.

15. The Commissioners claimed that the stamp duty should be on a value, including all accretions from the death of Isabel Cook to the date of the administration, viz., 23d of July, 1855, and also claimed

that the grant of *administration for the effects of the late Ellis Cook, who survived his wife, should be stamped at the same rate. [*463

16. Mr. Partington submits to pay the increased duty on the aforesaid sum of	£22,403 18 10
Add interest received from Henry Revell Reynolds up to Mrs. Cook's death	1,190 0 0
	23,593 18 10
Deduct taxed costs of Partington v. Reynolds for recovery of estates	3,395 0 3
	20,198 18 7
Subsequent costs of administering the estate amounting to 259 <i>l.</i> 16 <i>s.</i> 4 <i>d.</i> , would also have to be deducted	259 16 4
	£19,939 2 3

17. The question as to Ellis Cook's estate has this in addition. The property of Frances Shard was ordered to be paid to the defendant Partington as the administrator of Isabel Cook, and by the grant of administration to Isabel Cook's estate, is for the use and benefit of James Cook. Mr. Partington having so as aforesaid received the money, proceeded with it to America, where it was paid over by him to James Cook, who gave a release for the same both in regard to Isabel Cook's estate and also as the administrator in America of Ellis Cook, he having taken out administration to Ellis Cook in America for the purpose of administering the estate in that country.

18. Judgment is to be entered for the Crown, without costs, for such an amount of duty as shall appear to be due, according to the opinion of the Court upon the above facts, and according to the principle on which the Court shall be of opinion that the same ought to be charged.

The questions for the opinion of the Court are:—

First.—What probate duty is payable in respect of the estate of Isabel Cook?

Secondly.—Whether any, and if so, what probate duty is payable in respect of the estate of Ellis Cook?

**Sir F. Kelly* (with whom were *The Attorney-General, The Solicitor-General, Locke, and Beavan*), for the Crown (June 12).— [*464 The question is whether probate duty is payable in respect of the interest which has accrued up to the time of the grant of administration. It is conceded that the Crown is entitled to duty on the principal sum, 23,821*l.* 4*s.* 5*d.*, but there are three other sums in respect of which the duty is claimed. First, a sum of 1190*l.*, being interest at 4 per cent. from the time of the receipt of the principal sum by the then Solicitor of the Treasury up to the death of Isabel Cook in 1825; secondly, a sum of 5000*l.* for interest from the time of the death of Isabel Cook to the death of her husband, Ellis Cook, in 1830; and thirdly, a sum of 28,000*l.* for interest from the time of the death of Ellis Cook until the grants of administration to the defendant in the year 1855. The question, which applies to all those sums, is whether, upon a grant of administration at any period after the death of an intestate, probate duty is payable upon the amount or value of the

estate at the time of his death, or at the time of the grant of administration. Not only upon principle but authority, and by the words of the statute, 55 Geo. 3, c. 184, the duty is payable upon the amount or value of the estate at the time of the grant of administration. By the 55 Geo. 3, c. 184, Sched., part III., tit. *Letters of Administration*, duty is charged upon the estate and effects for or in respect of which letters of administration are granted; and they are granted in respect of that estate which exists at the time of the grant, and which it enables the administrator to recover. Then what was that estate in this case? In the year 1855, when administration was granted to the defendant, it consisted of 23,884*l.* principal and 34,124*l.* interest, and upon those amounts the duty attached. By the 38th section of the 55 Geo. 3, c. 184, no ecclesiastical Court shall grant probate or letters of *465] administration without an affidavit, "that the estate and effects of the deceased for or in respect of which probate or letters of administration is or are to be granted, &c., are under the value of a certain sum to be therein specified." The legislature has used the word "are" in the present tense as indicating the time when administration is granted. [POLLOCK, C. B.—A bond, upon which no interest had been paid for nineteen years after the death of the obligee, might then be the subject of probate; is there any authority that the duty is only payable on the principal sum secured by the bond?] There is no direct authority, though the case must frequently happen; for instance, where stock rises or is increased by the dividends, after the death of the owner and before probate. In *Doe d. Richards v. Evans*, 10 Q. B. 476 (E. C. L. R. vol. 59), a person died possessed of a leasehold estate which was then of less value than 100*l.*, but at the time of the grant of administration it was worth more than 100*l.* Duty was paid upon 100*l.* only, and it was held insufficient. That decision proceeded on the broad principle that a Court of law cannot entertain the question of difference in value of an estate at the time of the owner's death and of the grant of administration. *Hunt v. Stevens*, 3 Taunt. 113, is also an authority, that if an administrator sues for a greater value than is covered by the ad valorem stamp, he cannot recover. It is immaterial whether the sum sought to be recovered is principal or interest, the duty must be paid on the full value at the time administration is granted. An administrator is bound to take out the grant to the extent of the sum he expects to receive: *Butler v. Butler*, 2 Phil. Eccl. C. 39. [MARTIN, B.—Suppose an administrator brought an action for money lent, and proved his case, could the defendant say "You are entitled to interest, which renders the stamp *466] insufficient, *and therefore you can recover nothing"?] In *The Attorney-General v. Brunning*, 8 H. L. 243, 261, Lord Wensleydale points out that all difficulty in fixing a precise amount is remedied by the statute, which provides that, if too high a duty is imposed in the first instance, the difference is to be returned; if too little duty is imposed the difference is to be made good. The question is, what is the value of the estate which the grant of administration enables the administrator to obtain? *The Attorney-General v. Brunning* is an authority that all moneys recoverable by virtue of a grant of administration, in whatever form recovered, whether by the agency of a Court of law or equity, are part of the estate and effects of the

intestate, and liable to duty. Also that all rights of action for unliquidated damage vest in the person to whom administration is granted. At common law the Ordinary might have taken possession of the principal money and the interest which accrued after the death of the intestate; and by the grant of administration he conveyed to the defendant all the rights which he possessed. [MARTIN, B., referred to *Matson v. Swift*, 8 Beav. 368.] That case is distinguishable on the grounds stated by Lord Campbell in *The Attorney-General v. Brunning*, viz., that the executor did not receive the money *qua* executor, by virtue of the probate; and at the time of the testator's death the property was *de facto* land, although the proceeds of it, when sold, were to be distributed as personalty. [MARTIN, B.—*The Attorney-General v. Brunning* has no bearing on this case, because here the question is whether the duty is payable on the value of the estate at the time of the intestate's death or of the grant of administration.] It is an authority to this extent, that it is immaterial whether the remedy for the recovery of the money is by action at law or a bill in equity, or whether the money sought to be recovered is a sum certain or unliquidated *damages. [BRAMWELL, B.—Suppose a person [*467 died intestate, leaving nothing in money but only a judgment recovered for 1000*l.*; if no administration was taken out for ten years, must it be for the 1000*l.* and 4 per cent. interest?] For the value of the judgment at the time of probate. The practice is to require all rents, interests, and dividends from the death of the testator or intestate to the date of the probate or letters of administration to be included in the estimate upon which duty is paid: Gwynne on the Law relating to the Duties on Probates and Letters of Administration, p. 25, 3d ed. In *The Attorney-General v. Brunning*, 8 H. L. 243, 261, Lord Wensleydale said:—"The right to enforce the contract of sale entered into by the testator belongs to his executor. That right is part of his estate and effects, and the probate is a necessary instrument to support his claim at law or in equity." So, here, the right to this interest belonged to the Ordinary at common law, and it passed by the grant of administration to the defendant, as part of the estate and effects of the testator. If the duty was payable on the value of the estate at the time of the death of the testator or intestate, great injustice might be done. For instance, suppose a person died possessed of a ship worth 10,000*l.*, with a cargo on board worth 20,000*l.*, but before administration was granted the ship and cargo were lost at sea, could it be contended that the duty must be paid upon their value? [POLLOCK, C. B.—Or suppose a house with its furniture was destroyed by fire.] The word "estate" means the whole estate which passes by the grant of administration. The defendant admits that he is bound to pay duty, not only on the value of the estate at the time of Frances Shard's death, but also on the sums, which added to that value, between the death of Frances Shard and the year 1823, when the whole was realized; and the interest which accrued between the year 1823 and 1825, *when Isabel Cook died. Then upon [*468 what principle can it be contended that he is not liable to pay duty upon the interest which accrued between the year 1825 and the death of Ellis Cook in 1830, and between that time and the grant of administration? [BRAMWELL, B.—The Court of Chancery must be

taken to have decided that the Solicitor of the Treasury was a trustee for Isabel Cook, and ought to have paid her 22,403*l.* principal and 1190*l.* interest, which was the value of her estate at her death. The defendant says that he is only liable to pay duty on that.] The defendant is also administrator of Ellis Cook, who at the time of his death was entitled to 5000*l.* interest. The Crown claims duty on each devolution. If Ellis Cook had taken out administration to Isabel Cook, he must have paid duty, and a further duty is payable on the administration of Ellis Cook.

Lush (*Milward* with him), for the defendant.—First, no duty is payable upon the grant of administration to Ellis Cook, because the defendant took no estate under it. [BRAMWELL, B.—Only one estate is obtained by the two administrations.] The defendant's title is derived from Isabel Cook, not from Ellis Cook. He was entitled to take out administration to his wife, and reduce her choses in action into possession. If he had done so the estate would have been his, and the administrator of his wife would have taken nothing under the grant. But having died without obtaining administration to his wife, her property cannot be recovered by his representative, but only under the administration to the wife: *Williams on Executors*, vol. 1, p. 778, 5th ed.

Secondly, it is said that the duty must be assessed on the value of the estate recoverable under the administration; but that is not so. The test is, what, at the time of the intestate's death, was the value of his estate which the *Ordinary might then have administered. *469] If, at the time administration is granted, the value of the estate has increased, duty must be paid upon the increased value; if, on the other hand, the value is diminished, duty is only payable on the diminished value. But in estimating the value no subsequent accretion can be taken into account. There is no authority against that proposition, and the case of *Doe d. Richards v. Evans*, 10 Q. B. 476 (E. C. L. R. vol. 59), is in accordance with it. By the 55 Geo. 3, c. 186, Sched., tit. *Letters of Administration*, the duty is assessed upon the estate and effects for or in respect of which the administration is granted. Administration is granted for and in respect of the goods which at common law, the Ordinary would have administered. By the letters of administration of Isabel Cook's estate, the Ordinary granted to the defendant full power and authority to administer the goods, chattels, and credits, "which, whilst living, and at the time of her death, did in any way belong to her estate." There is this distinction between probate and legacy duty, that the former is confined to goods which belonged to the deceased at the time of his death, and which at common law the Ordinary would have administered. Legacy duty is payable on whatever amount a legatee receives. In the case of *In re Ewin*, 1 C. & J. 151,† it was held that American, Austrian, French, and Russian stock, the property of a testator domiciled in this country, was liable to legacy duty; but in the case of *The Attorney-General v. Dimond*, 1 C. & J. 356,† it was held that probate duty was not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property be brought into and administered in this country. The principle of that decision was that probate duty is only payable in respect of that

estate which the Ordinary could have administered. The Attorney-General *v. Hope*, 1 C. M. & R. 580, 560,† is an authority to the same effect. There Lord Brougham, C., said:—"The [*470 words of the Act refer, not to the use eventually made of the probate, but distinctly to the purpose for which the probate was granted." Regard must be had to the value of the estate and effects at the time of the death, and nothing ought to be taken into account of which the intestate did not die possessed. Suppose an intestate died possessed of a leasehold estate, and nineteen years afterwards administration was granted of his effects, when a large sum would be due for rent, and the administrator brought ejectment, he might state his title on the day after the death of the intestate, and recover in his own right as mesne profits the rent which subsequently accrued. As a trustee he would be bound to account for those rents, but they would not be assets in respect of which probate duty would be payable, because they were not part of the estate of which the intestate died possessed. In *Doe d. Richards v. Evans*, 10 Q. B. 476 (E. C. L. R. vol. 59), the estate in respect of which the duty was payable was the identical estate which passed by the letters of administration. [POLLOCK, C. B.—In the case of a bond, payable with interest, if administration was not taken out until nineteen years after the death of the obligee, would it be sufficient to pay duty on the amount of the principal only?] *Primâ facie*, the stamp duty must cover the amount sought to be recovered; but it need not in every case where a person is obliged to sue as executor. In *The Attorney-General v. Hope*, 1 C. M. & R. 580, 560,† if the executors had brought an action in respect of the property in the foreign country at the time of the testator's death, but afterwards brought to this country, upon production of the probate the stamp duty would appear too little, but when it was proved that the property was in a foreign country when the testator died, the objection would be removed. [MARTIN, *B.—Suppose a person died possessed of a chattel annuity, [*471 and probate of his will was not granted until ten years afterwards, would duty be payable on the sum which accrued after his death?] The annuity would be capitalized, and its value ascertained at the time of probate. [BRAMWELL, B.—Then there would be the value of the years to run and also the subsequent accretion.] The valuation would be of that which existed as a chattel and of which the testator died possessed. [CHANNELL, B.—When an executor applies for probate, or an administrator for administration, must he not be considered, for the purpose of probate duty, in the same position as the testator or intestate would have been if he had lived up to that time? Then, what would have been the value of Isabel Cook's estate if she had lived up to the time when probate was granted to the defendant?] Suppose a wrongdoer took possession of a leasehold estate, of which an intestate died possessed, and carried away the crops for five years, at the end of which time administration was taken out; probate duty would not be payable on the value of the crops, for the intestate was never possessed of them, and the administrator's title would relate back to the time of the death of the intestate: *Williams on Executors*, vol. 1, p. 558, note (p), 5th ed. [POLLOCK, C. B.—Suppose an intestate dies possessed of a leasehold

estate of the value of 1000*l.* a year, and of which five years are unexpired, and a pauper takes possession of it, but at the end of the five years, when the term has expired, administration is taken out, is probate duty payable on the value of the estate at the time of the death?] It would not. Here there was no contract to pay interest, but it was awarded by the Court of Chancery as a penalty for the misapplication of the principal. That cannot in any sense be considered as goods of which the intestate died possessed. In the case of stock *472] which has increased in value at the time administration *is granted, probate duty is payable on that increased value, because it is the present value of the identical thing of which the intestate died possessed. So, if the stock has decreased in value, duty is only payable on the decreased value. [BRAMWELL, B.—Suppose the case of a bill of exchange for 2000*l.*, upon which an administrator does not sue until five years after the death of the intestate, and the jury give 400*l.* for interest by way of damages, ought the probate to be for 2000*l.* or 2400*l.*?] There the interest is inseparable from the principal, as, in *Doe d. Richards v. Evans*, the improved value of the land by building upon it: here the interest is not anything annexed to the principal, but an accidental accretion. The Statute of Distributions, 22 & 23 Car. 2, c. 10, s. 1, requires an administrator to exhibit in the Ecclesiastical Court an inventory of “the goods, chattels, and credits of the deceased *at the time of his death*,” but this interest need not be included in the inventory as part of the goods of which Isabel Cook died possessed. In *Pitt v. Woodham*, 1 Hagg. Eccl. C. 250, it was held that the Ecclesiastical Court could not call for an account of the profits which the administratrix made on the intestate's business subsequently to his death. It can make no difference whether the administrator makes a profit out of the assets in his hands, or whether a third person gets possession of the assets, and is ordered to pay them over to the administrator with interest; neither the profits nor the interest are part of the goods of which the intestate died possessed. This interest is in the nature of damages for the detention of the principal, and not assets for the purpose of probate duty.

Sir *F. Kelly* replied.

Cur. adv. vult.

*473] *POLLOCK, C. B., now said,—The question in this case is, whether probate duty is payable on the value of the property as increased by the interest; or whether it is payable without reference to such increase. I am of opinion, upon the authority of the cases cited, especially that of *The Attorney-General v. Brunning*, 8 H. L. 243, and *Doe d. Richards v. Evans*, 10 Q. B. 476 (E. C. L. R. vol. 59), that the value at the time of the grant of administration is the value upon which the duty is payable.

It is true, as my brother Martin observed, the question in *The Attorney-General v. Brunning* was not the same as that now before us; but the opinion of the House of Lords, although not absolutely binding on us as an authority unless the question is the same, is still of considerable weight as the opinion of eminent and learned persons. In *The Attorney-General v. Brunning*, Lord Campbell, C., said:—“I am clearly of opinion that all moneys which the executor recovers by virtue of the probate must be considered part of the estate and effects of the testator, and subject to probate duty.” Now, here, the interest was increasing

for about thirty years, and amounted to upwards of 34,000*l.*, which was undoubtedly recovered by virtue of the probate; so that there is the express authority of Lord Campbell that it must be considered as part of the estate and effects of the intestate, and subject to the probate duty. Lord Cranworth and Lord Wensleydale also expressed an opinion, though not in such distinct terms, that whatever an executor or administrator recovers by the probate must be considered as part of the estate and subject to probate duty. Our judgment will, therefore, be for the Crown.

MARTIN, B., said,—I do not feel sufficient confidence in my own opinion to differ from the rest of the Court; but I consider the point by no means clear. The question turns *upon the meaning of the words in the 55 Geo. 3, c. 184, Sched., part III., tit. *Letters of Administration*, “estate and effects, for or in respect of which such letters of administration shall be granted.” The 38th section does not in my opinion carry the case further; it merely requires an affidavit of the value of the “estate and effects” within the meaning of the Schedule. Now, a grant of administration is a power and authority to administer and dispose of the goods, chattels, and credits which *at the time of the death* of the intestate belonged to his estate; but this increase, in respect of which the duty is claimed, accrued years after the death of the intestate. I do not think that the cases of *Doe d. Richards v. Evans*, 10 Q. B. 476 (E. C. L. R. vol. 59), and *The Attorney-General v. Brunning*, 8 H. L. 243, govern this. *Doe d. Richards v. Evans* was the case of a chattel interest in land which was improved in value by building after the owner's death and before the grant of administration; and it was properly held that probate duty was payable on the value of the land at the time administration was granted. That case is clearly distinguishable from this. As, however, the other members of the Court are of opinion that probate duty is payable upon this property, although the right to it did not exist until more than thirty years after the intestate's death, the Crown is entitled to judgment.

BRAMWELL, B., said,—I am of opinion that the Crown is entitled to judgment for the amount claimed. The question is, what probate duty ought to be paid. It was rightly conceded by Mr. *Lush*, that probate or administration duty is a duty which attaches upon the estate and effects of the testator or intestate at the time of his death, but is to be calculated upon the value of the estate at the time probate or administration is granted. I think he was well warranted *in that concession, for the 38th section of the 55 Geo. 3, c. 184, says, that “No Ecclesiastical Court or person shall grant [*475 probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, &c., that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, &c., are under the value of a certain sum to be therein specified,”—speaking in the present tense of the time when probate or administration is granted.

Now, in order to ascertain the value of this estate, we must first

see what it is. Isabel Cook was sole next of kin to a person who in the year 1819 died intestate, of whose estate and effects the then Solicitor of the Treasury took out administration, and received under it a large sum of money. Isabel Cook was entitled to that money and something more, which arose in this way.—The Solicitor of the Treasury ought to have paid the money received by him to her; or, if he did not, he ought to have protected himself by proceedings in Chancery, during the pendency of which the money would have been invested in the public funds; or at all events, if he retained the money, he ought to have invested it in some security bearing interest. Therefore the amount due from him was the principal sum with an accessorial sum, according to the way in which he used the money, that is to say, if he made a proper use of it by investing it, the interest; if he kept it and made a profit out of it, damages for that profit. That was the estate to which Isabel Cook was entitled at the time of her death; and at that time it would have been represented by the principal sum and about six years' interest. Upon her death that estate became the property of her administrator, and in my opinion *476] he was *entitled to that—neither more nor less. But, thirty years afterwards, when administration of the estate of Isabel Cook was granted to the defendant, it had grown to be of thirty years' more value, that is to say, the accessorial sum, the interest, had increased, but the estate was the same estate as she had, and no other. I confess I do not see any difference between this case and that of a bill of exchange due at the time of the death of an intestate, and which continues unpaid for five years afterwards, when, administration of his estate being taken out, considerable arrears of interest would have accumulated, and the administrator would be entitled to compensation in the nature of damages. In that case the duty ought to be calculated on the sum payable. Mr. *Lush* admitted that was so, but attempted to distinguish this case. There is one test, which to my mind is irresistible. If, in the case of a bill of exchange, the principal sum was released, the accessorial sum would be gone with it. So here, if the administrator had granted to the Solicitor of the Treasury a release of the principal sum, all damages in respect thereof would have been gone. That seems to me to show that it was the same estate, and no other. Therefore Mr. *Lush* was warranted in admitting that in the case of a bill of exchange probate duty ought to be calculated on that principle; but, first, he attempted to distinguish this case, and failed; and next, he contended that the defendant had a mere claim for compensation in the nature of damages which was not interest on the estate, but that seems to me no more so in the present case than in that of a bill of exchange.

With great deference for my brother Martin's doubt, I think that the claim of the Crown is well founded. The case of *Doe d. Richards v. Evans*, 10 Q. B. 476 (E. C. L. R. vol. 59), decided that an increase in the value of the estate subjected it to a higher rate of *477] duty *than if probate had been taken out shortly after the death. It does seem at first a hardship that a person should have to pay a higher rate of duty in consequence of a delay in taking out administration, which was no fault of his; but the Crown might

say, "If you had been alive to your rights, and had taken out administration sooner, we should have had the money in our hands long ago."

For these reasons I am of opinion that the Crown is right; and my brother Channell, who heard the case argued, entertains the same opinion.

Sir F. Kelly, in the following Term (Nov. 12), asked the Court whether judgment was to be entered for the Crown for the duty claimed upon both estates. The Court, on a subsequent day (30th April), said that the judgment should be entered for the amount claimed in respect of the estate of Isabel Cook only, and that no duty was payable in respect of the estate of Ellis Cook.

Judgment accordingly.

*WOODS and Others v. THIEDEMANN. June 16. [*478

The defendant, a merchant at Newcastle, was a customer of the plaintiffs, bankers at Newcastle, whose London agent was the Union Bank. H., a merchant at Wolgast in Prussia, wrote to the defendant stating that he was inclined to consign to him a cargo of wheat, and asking for how much and at what date the defendant would open for him a credit in London. The defendant wrote in reply:—"You may draw against transmittal of bill of lading at 30s. to 32s. per quarter in advance for your best yellow wheat on our account at 14 days, 1, 2, or 3 months' date, on the Union Bank of London." H. afterwards wrote to the defendant, stating that he was about to consign to him 8320 scheffels of wheat shipped by the vessel "Anna," Captain K.; and that he annexed duplicate bill of lading. On the same day H. wrote to the Union Bank stating that he had drawn on them six bills of exchange for 400*l.* each, for account of defendant. The Union Bank having no instructions, sent the letter to plaintiffs. Messrs. B. and C. afterwards presented to the Union Bank for acceptance six bills of exchange for 400*l.* each drawn and endorsed by H., together with a paper writing purporting to be a bill of lading endorsed by H. in blank. The plaintiffs having sent to the defendant the letter which H. addressed to the Union Bank, the defendant came to the plaintiffs' Bank and had some conversation with the manager respecting the cargo of wheat supposed to have been shipped by H., when defendant said "it was a large amount and that they must only accept against the bill of lading." The defendant then wrote to the plaintiffs as follows:—"We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H., of Wolgast, for 2400*l.* against properly endorsed bill of lading of 8320 scheffels of wheat per 'Anna,' F. K. master, on our account." The Union Bank, at the request of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the drafts became due, it was discovered that the bill of lading was forged, and that no cargo was shipped on board the "Anna." H. was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills and debited the plaintiffs with the amount:—Held, that the plaintiffs were entitled to recover the amount from the defendant on an implied contract to indemnify them.

THE first count of the declaration stated, that before and at the time of making the promise, &c., the plaintiffs carried on business in co-partnership as bankers in the town of Newcastle-upon-Tyne, and certain persons carrying on business in copartnership as bankers, under the name and style of The Union Bank of London, were the agents and correspondents, in the city of London, of the plaintiffs in their business of bankers; and the defendant was a merchant in Newcastle-upon-Tyne, and a customer of the plaintiffs in the way of their said business of bankers. And whereas, before the making of the promise, &c., one Otto Homeyer had sent to the defendants, and the defendants had received from the said Otto Homeyer, a paper writing,

purporting to be a bill of lading, the same being written in the German language, and which, being translated into *English, *479] was and is of the meaning, and to the purport, tenor, and effect following. (The declaration then set out the bill of lading, see *post*, p. 482.) And thereupon in consideration that the plaintiffs at the request of the defendant would request and procure the said Union Bank of London, so being their agents and correspondents as aforesaid, to accept on account of the defendant, upon the credit and responsibility of the plaintiffs, drafts or bills of exchange of the said Otto Homeyer for 2400*l.* against the bill of lading of 8320 scheffels of wheat, per "Anna," F. Kell, master (being the bill of lading before set forth), when properly endorsed by the said Otto Homeyer, the defendant agreed with and promised the plaintiffs to provide for the payment of the said drafts or bills of exchange, or to repay the plaintiffs and indemnify them against the said amount of the said drafts or bills of exchange, and all such moneys as the plaintiffs should thereby become liable to pay, and allow to the said Union Bank by reason of their accepting the same drafts as aforesaid.—Averment: that the plaintiffs, relying on the said promise and agreement of the defendant, did afterwards request and procure the said Union Bank of London, so then being their agents and correspondents as aforesaid, to accept, and the said Union Bank of London did accept, on account of the defendants, and upon the credit and responsibility of the plaintiffs, the drafts or bills of exchange of the said Otto Homeyer for 2400*l.*, to wit, six drafts, &c., against such bill of lading as aforesaid, the same being then properly endorsed by the said Otto Homeyer, and the same bill of lading so endorsed was delivered by the endorsees and holders of the said drafts or bills of exchange to the said Union Bank of London, and was kept and retained for a reasonable time in that behalf by the said last-mentioned bank, and by the plaintiffs on behalf and for the *480] security and benefit of the defendant, and was afterwards *and at the expiration of the said reasonable time, and before the commencement of this suit, delivered to the defendant, according to the true intent and meaning of the said agreement between the plaintiffs and the defendant; and afterwards the said drafts or bills of exchange became due and payable; of all which premises the defendant then had notice. And the defendant did not provide for the payment of the said drafts or bills of exchange. And the said Union Bank of London, as such acceptors of the same, were thereupon compelled to pay and did pay the same to the endorsees and holders thereof, and also certain charges and commission thereon. And the plaintiffs were forced and compelled to pay and allow, and have paid and allowed, to the said Union Bank of London, so being their agents and correspondents as aforesaid, the said sum of 2400*l.*, being the amount of the said drafts, &c. And the plaintiffs did all things necessary, &c., to entitle them to be by the defendants repaid and indemnified against the amount of the said drafts, &c.—Breach: that the defendant has not repaid or indemnified the plaintiffs, &c.—There were also counts for money lent, money paid, money received, &c.

Pleas, to first count.—First: Non assumpsit.

Second.—That the bill of lading against which the plaintiffs were, according to the alleged contract, to request and procure the said

Union Bank of London to accept drafts or bills of exchange on account of the defendant, was not the said document purporting to be a bill of lading, which is in the first count set forth, nor was that document a bill of lading of (8320) eight thousand three hundred and twenty scheffels of wheat, per "Anna," F. Kell, master.

Third.—That the said Union Bank of London did not, at the request or by the procurement of the plaintiffs, accept the said drafts or bills of exchange, or any of them, against any bill of lading against which, according to the alleged *contract, the plaintiffs were to request and procure the said Union Bank to accept drafts [*481 or bills of exchange on account of the defendant.

To indebitatus counts (except as to 27*l.* 12*s.* 8*d.* paid into Court) the defendant pleaded never indebted, payment, and set-off.

The replication joined issue on all the pleas.

The cause came on for trial, before Pollock, C. B., at the London Sittings after Hilary Term, 1861, when a verdict was found for the plaintiffs for 2016*l.*, subject to the opinion of the Court upon a special case (so far as material) as follows:—

1. The plaintiffs are and were, in June, 1858, bankers at Newcastle-upon-Tyne. Their agents and correspondents in London are the Union Bank of London.

2. The defendant is, and in June, 1858, was, a merchant at Newcastle-upon Tyne, and a customer of the plaintiffs in their business of bankers.

3. Previously to June, 1858, the defendant knew and had some business transactions with one Otto Homeyer, a merchant at Wolgast in Prussia. On the 9th day of June, 1858, the said Otto Homeyer sent from Wolgast a letter to the defendant, of which the following is a translation:—"During the spring I had the pleasure of seeing your traveller with me, and in consequence of the conversation I had with him I am rather inclined shortly to consign a cargo of wheat to you. I therefore beg to ask for how much, and at what date, you will open for me a credit in London?"

4. On the 12th June, 1858, the defendant wrote in answer:—"You may draw against transmittal of bill of lading, 30*s.* to 32*s.* per quarter in advance for your best yellow wheat on our account at fourteen days, one, two, or three months' date, on the Union Bank of London. Insurances we can effect you at Lloyds' at half per cent. premium in toto."

*5. On the 26th June, 1858, Homeyer sent from Wolgast a letter to the defendant as follows:—"In answer to your letter [*482 of the 12th, I have made up my mind to consign to you the 8320 scheffels (being about 1500 quarters) wheat shipped by the vessel "Anna," Captain Kell; for which I annex duplicate bill of lading. At the same time I take the liberty to make use of your kindness, and to draw 2400*l.* for your account on the Union Bank of London at two months' date, requesting you to provide due protection for those drafts. The insurance you will please effect there at the premium stated."

6. There was enclosed in the last-mentioned letter a paper purporting to be an unendorsed bill of lading (being one of a set of four), of which the following is a translation:—"I, F. Kell, of Wolgast, cap-

tain of the vessel 'Anna,' now loading in Wolgast, and bound for Newcastle, acknowledge having received on board the said vessel from Mr. Otto Homeyer, well good conditioned, 8320 (eight thousand three hundred and twenty) scheffels of good sound wheat and 350 mats, in order to deliver the same after completed voyage to his order, on paying freight of 1s. 6d. per delivered imperial quarter of wheat, average according to custom. For the fulfilment of this, I pledge my person, goods, and the vessel, with all apparel; for which I have signed four bills of lading of the same tenor only good for one.

"Wolgast, 26 June, 1858.

"F. KELL."

7. A vessel called the "Anna," commanded by one Captain Frederick Kell, was at Wolgast on or about the said 26th June.

8. The last-mentioned letter and document were received by the defendant on the 29th June, 1858, and on that day he wrote to his insurance broker in London, directing him to effect an insurance at Lloyds' upon the wheat in question.

*483] *9. On the same 26th June, Homeyer sent from Wolgast to the Union Bank of London a letter as follows:—"For account Messrs. R. Thiedemann & Co., in Newcastle. I have taken the liberty to value upon you

£400	} In first and seconds to my own order at two months' date.
£400	
£400	
£400	
£400	

and I beg that you will give prompt protection to them for account of said friends."

10. This letter was on the 29th June, 1858, received by the Union Bank of London, who, having then no instructions, sent it on the same day to the plaintiffs.

11. On the 30th June, Messrs. Bischoffsheim & Goldschmidt, merchants in London, presented to the Union Bank of London for acceptance six drafts or bills of exchange for 400l. each, drawn by the said Homeyer, dated 26th June, 1858, payable at two months after date to his order, and at the same time presented to and left with the said Union Bank of London, a paper writing, purporting to be a bill of lading of the same tenor and effect, and one of the same set as the document before set out, and which the defendant had received unendorsed from Homeyer; but the said document purporting to be a bill of lading, so left with the Union Bank of London, was endorsed in blank by the said O. Homeyer, and by him only. Messrs. Bischoffsheim & Goldschmidt, in presenting these bills of exchange and the document purporting to be a bill of lading, acted simply as agents of the Berlin Discount Company, bankers at Berlin, to whom the said Homeyer had endorsed the seconds of the said bills, and who then held the same for value to the full amount thereof.

*484] 12. On the said 30th June, the plaintiffs sent to the *defendant the letter which Homeyer had addressed to the Union Bank of London, and requested his instructions thereon.

13. Defendant came afterwards, on the same day, to the plaintiffs'

bank and saw Mr. Spence, their manager, who had already seen Homeyer's letter to the Union Bank of London, and the letter of the latter enclosing Homeyer's. Some conversation took place between the defendant and Mr. Spence respecting the cargo of wheat supposed by the defendant to have been shipped by Homeyer. Defendant observed that business had been dull lately, but that this was a large transaction, and the defendant had no doubt but that it would be a good one. Defendant then added that it was a large amount, and that they must only accept against the bill of lading. The defendant then handed the following letter, signed by him, to Mr. Spence:—

"Newcastle, 30th June, 1858.

"Messrs. Woods, Parker & Co.,

"Gentlemen.—We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Otto Homeyer, of Wolgast, for 2400*l.* (two thousand four hundred pounds), against properly endorsed bill of lading of 8320 scheffels of wheat, per 'Anna,' F. Kell master, on our account.

"We are, gentlemen, &c.

"R. THIEDEMANN & Co."

14. On the same day (30th June) the plaintiffs, having received the above letter, sent to the Union Bank of London the following letter, written by Mr. Spence:—"Gentlemen,—Please accept the drafts of O. Homeyer, of Wolgast, for 2400*l.* against properly endorsed bill of lading of 8320 scheffels of wheat per Anna, F. Kell, master, % Rudolph Thiedemann & Co., and debit us for the same. We enclose the letter from Mr. Homeyer."

15. On receipt of this letter the Union Bank of London, *on the 1st July, 1858, in good faith and believing the said docu- [*485 ment to be a genuine bill of lading, accepted the six drafts or bills of exchange for 400*l.* each, which had been presented by Messrs. Bischoffsheim & Goldschmidt, and retained the aforesaid document purporting to be a bill of lading which had been so left with them endorsed in blank as aforesaid, and continued so endorsed in blank; and on the same day sent a letter to the plaintiffs, stating that they had accepted Homeyer's draft against the said bill of lading, and enclosing the same. This document so endorsed was sent by the plaintiffs on the 2d July, 1858, to the defendant enclosed in a letter stating—"We debit you 2400*l.* for Homeyer's drafts on the Union Bank of London on your account, due 29th August, against the enclosed bill of lading."

16. As the bills for 2400*l.* related to the defendant's foreign transactions, that sum, together with 9*l.* 1*s.* for the plaintiff's commission on the acceptance of the bills, was debited to the defendant's "foreign banking account" on the 2d July, 1858.

17. Defendant wrote and sent three letters to Homeyer on the 30th June and 3d and 6th July, 1858, containing the following passages:—30th June. "Out of your favour of 26th we took duplicate bill of lading for 8320 scheffels wheat per Anna, and the Union Bank will promptly honour your drafts for 2400*l.* against the properly endorsed original." 3d July. "We confirm ours of 30th ultimo, and your drafts, together of 2400*l.* on the Union Bank, in anticipation of the cargo per Anna, have now been duly honoured. . . . If the Anna should arrive soon, we trust to effect a good sale of the cargo." 6th

July. "We are anxiously looking out for the Anna with such good markets."

18. On the 12th July, 1858, defendant first discovered that a fraud *486] had been committed by Homeyer, and that the *alleged bills of lading were forgeries; that they had not been signed by F. Kell, but had been forged by Homeyer; that no wheat had been shipped on board the Anna, and that she had sailed from Wolgast in ballast. On the same day the defendant informed Mr. Spence of the discovery.

19. On the 13th July, 1858, the defendant personally informed the authorities of the Union Bank of London of the fraud and forgery, and gave notice to them not to pay the bills for the defendant's account.

(The case then proceeded to state the following facts:—On the 14th July, 1858, the defendant filed a bill in Chancery against Messrs. Bischoffsheim & Goldschmidt and O. Homeyer and the Berlin Discount Company, to restrain them from prosecuting any action against the defendant or the Union Bank of London on the bills. An interim injunction was obtained, but afterwards dissolved, and the bill dismissed, (a) whereupon the Union Bank paid Bischoffsheim & Goldschmidt the amount of the bills and expenses, and debited the plaintiffs with the same in account. Homeyer absconded from Wolgast, and on the 17th July arrived in London, where he was apprehended at the instance of the defendant, and tried and convicted of uttering the forged bills.)

30. From the 2d July, 1858, when the plaintiff debited the defendant's banking account with the amount of Homeyer's drafts, and their commission for accepting the same, down to the 18th of November, 1859, the defendant continued to deal with the plaintiffs as his bankers, paying in and drawing out moneys to an amount far exceeding the amount of those debits.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the amount for which the verdict was entered, *487] or any part thereof. If the Court *shall be of opinion that the plaintiffs are entitled to recover, the verdict shall stand for such amount as the Court shall direct. If the Court shall be of opinion that the plaintiffs are not entitled to recover any part of such amount, then the verdict is to be entered for the defendant.

Montague Smith (with whom were *Manisty* and *Heath*), for the plaintiffs. (b)—The plaintiffs are entitled to recover. The defendant treated the bill of lading as a genuine document, and requested the plaintiffs to procure the Union Bank of London to accept Homeyer's draft, properly endorsed, against it. The plaintiffs complied with his request, and on the 2d of July informed the defendant that they had debited his account with the amount of the drafts; and his subsequent payments discharge that item. The defendant by his conduct

(a) See report of proceedings in Chancery, 1 Giffard 142; 1 De Gex, F. & J. 4.

(b) The plaintiffs' points in substance were, that the contract between them and the defendant was with respect to the document enclosed in Homeyer's letter, and which defendant treated as genuine. Also that defendant had acquiesced in being debited with the amount of the bills of exchange, and had by general unappropriated payments discharged the same; and that the amount now sued for was a general balance of a banking account arising out of items as to which there was no dispute.

induced the plaintiffs to believe that a bill of lading of the wheat did exist. [BRAMWELL, B., referred to *Robarts v. Tucker*, 16 Q. B. 560 (E. C. L. R. vol. 71).] It could not be expected that the plaintiffs would take more trouble than the defendant to ascertain whether the bill of lading represented a cargo. [MARTIN, B.—It is impossible to say that the payment of the bills was not assented to by the defendant.] The defendant is estopped by his conduct from denying that this was the bill of lading against which the drafts were to be accepted.

The Court then called on

**Lush*, for the defendant.—The first question is what was the authority or mandate from the defendant to the plaintiffs. [*488 On the 20th of June, Homeyer informed the defendant that he intended to consign to him a cargo of wheat, and he annexed a duplicate bill of lading. On the 30th the defendant wrote the letter to the plaintiffs, in which he asks them to request the Union Bank of London to accept the drafts of Homeyer for 2400*l.* against properly endorsed bill of lading, the defendant having previously told the manager of the plaintiff's bank that as the amount was large they must only accept against the bill of lading. The plaintiffs undertook to do so, and they charged the defendant a commission on the transaction. [POLLOCK, C. B.—It is preposterous to suppose that the plaintiffs took upon themselves the risk of the bill of lading being genuine.] The document against which they accepted was not a bill of lading, for it was not signed by the captain of the vessel. If he had signed it, it might have been a bill of lading, although no cargo was on board. In *Robarts v. Tucker*, 16 Q. B. 560 (E. C. L. R. vol. 71), it appeared that it was the practice of the Company, before accepting a bill of exchange, to examine it with a view of ascertaining whether the signatures of the payers were genuine, but, as that practice was not communicated to the bankers, it was held that the Company had given them no authority to pay the bill with the forged acceptances upon it. Here, what passed between Homeyer and the defendant was not communicated to the plaintiffs, and therefore does not affect their liability. [MARTIN, B.—In *Robarts v. Tucker*, whose duty was it to see that the bankers only paid upon presentation of a bill having genuine endorsements upon it? The bankers. In this case, whose duty was it to see that the bankers in accepting Homeyer's drafts were dealing with an honest man? The defendants. BRAMWELL, B.—In *Robarts v. Tucker* the bankers had a *remedy over against the persons who presented the bill, for [*489 a false representation that they had a right to payments. In this case, could the Union Bank of London recover back the amount of the bills from Messrs. Bischoffsheim & Company? They did no more than present the bills for acceptance, with the bill of lading; they did not warrant it genuine.] The defendant did nothing to mislead the plaintiffs, he asked them to accept only against a properly endorsed bill of lading. [POLLOCK, C. B., referred to *Young v. Grote*, 4 Bing. 253 (E. C. L. R. vol. 13).] The defendant must have meant a genuine bill of lading, and the plaintiffs must have so understood him. [POLLOCK, C. B.—The defendant meant a bill of lading, referring to a cargo of wheat which he supposed was shipped by Homeyer; neither party contemplated that he would commit a fraud.] [MARTIN, B.—In

the conversation between the defendant and the manager of the plaintiffs' bank, the statement of the defendant "that it was a large amount, and that they must only accept against the bill of lading," was not a direction to the plaintiffs, but only a part of the conversation. They did not say "mind, if there is anything wrong in the transaction, you must bear the loss." Here, there was no more authority to accept the bills against a forged bill of lading, than the authority in *Robarts v. Tucker*, 16 Q. B. 560 (E. C. L. R. vol. 71), was to pay upon a forged endorsement. [BRAMWELL, B.—Suppose the authority had been to accept the bills against a bill of lading of a box of diamonds, would the plaintiffs have been bound to examine the contents of the box?] If the plaintiffs objected to the responsibility, they should have inquired of the defendant whether the document presented was the bill of lading he meant, and if he answered in the affirmative, he must have borne the loss. [MARTIN, B.—The defendant, in his letter to Homeyer on the 30th of June, treats the bill of lading as a genuine *490] document.] The contents of that letter were not *communicated to the plaintiffs.—Secondly, there was no adoption by the defendant of the payment. The plaintiffs debited him with the amount when they accepted the bills, and he could not properly object to the payment until after the decision of the Court of Chancery.

Montague Smith was not called upon to reply.

POLLOCK, C. B.—We are all of opinion that the plaintiffs are entitled to recover. The only argument for the defendant is, that the words "bill of lading" import a genuine bill. I am of opinion that they meant such a document as Homeyer might send, or which was in the course of coming, professing to represent a cargo of wheat. If the facts were stated by way of recital, in the letter of the defendant to the plaintiffs of the 30th June, all doubt would be removed. The recital would be to this effect:—"Whereas I, the defendant, expect a cargo of wheat, accompanied by a bill of lading, and Mr. Homeyer, my correspondent abroad, has requested me to allow him to draw against it, which I have consented to do; therefore I request you, my banker, at Newcastle, to procure your London agents to accept the drafts of Mr. Homeyer for 2400*l.*, against bill of lading of 8320 scheffels of wheat, but you must take care that the bill of lading is properly endorsed." That is the meaning of the contract, not that the plaintiffs were to take upon themselves the risk of the bill of lading being a genuine document. The authority was to accept bills against a bill of lading properly endorsed, and no one supposed that the document produced would be a forgery. Suppose the captain had signed a bill of lading, there being no cargo on board the vessel. Such a bill of lading would no more bind the owner than this bill of lading; and could it be said that the bankers would be responsible? The transaction is simply this,—The defendant having entered into a commercial *speculation, and wishing to accommodate the person *491] with whom he was dealing, and for whose honesty he ought to be responsible, requests the plaintiffs to procure their London agents to accept drafts against a properly endorsed bill of lading. It seems contrary to all usage to assume that the plaintiffs undertook to be

responsible if it should turn out that the bill of lading was not signed by the captain, or no goods were on board.

It is not necessary to express any opinion as to the adoption by the defendant of what was done by the plaintiffs. For the reasons I have stated, I think that our judgment ought to be for the plaintiffs.

MARTIN, B.—I should be sorry if it were supposed for a moment that I thought the case of *Robarts v. Tucker* was not rightly decided. I believe it to have been perfectly rightly decided, but it has no bearing on this case. I think the plaintiffs are entitled to judgment on two grounds, first, upon the transaction itself; secondly, upon the adoption of the payment. But I am also of opinion that both are questions of fact, which ought properly to have been submitted to a jury, and the first question would have been, were the plaintiffs justified in accepting these bills, for, having accepted them, they were bound to pay them? I say the plaintiffs, because no difference has been made between the Union Bank of London, who actually accepted the bills, and the plaintiffs themselves, who are bankers at Newcastle.

Now, what are the facts? One Homeyer, a merchant at Wolgast, in Prussia, opened a correspondence with the defendant, and by his first letter, of the 9th June, he asks, "for how much, and at what rate, will you open for me a credit in London?" On the 12th June, the defendant wrote in answer, "You may draw against transmittal of bill of lading, 30s. to 32s. per quarter, in advance for your best yellow wheat, on our account, at 14 days, 1, 2, or three months' *date, on the Union Bank of London." That was followed by [492 another letter of the 26th June, in which Homeyer states his intention to do so; and he sends an annexed duplicate bill of lading. It is not in the same form, but it is a similar document to the ordinary bill of lading, and it purports to be signed by the captain of the "Anna," a vessel then at Wolgast. On the same day Homeyer communicated directly with the Union Bank of London, and I presume they were aware that the defendant was a customer of the plaintiffs, for, having no instructions, they sent Homeyer's letter to the plaintiffs. The plaintiffs sent the letter to the defendant, and on the 30th June he came to the plaintiffs' bank and had some conversation with the manager about the cargo of wheat, supposed by the defendant to have been shipped by Homeyer, the result of which was that the defendant wrote a letter to the plaintiffs, saying, "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Otto F. Homeyer, of Wolgast, for 2400*l.*, against a properly endorsed bill of lading of 8320 scheffels of wheat, per 'Anna,' F. Kell, master, on our account." The question is, what is the meaning of that document? For the purpose of ascertaining its meaning, we must look at the defendant's letter, of the same date, to Homeyer, which is to this effect:—"Out of your favour of the 26th, we took duplicate bill of lading for 8320 scheffels wheat, per 'Anna,' and the Union Bank will promptly honour your drafts for 2400*l.* against the properly endorsed original." Therefore there was evidence for a jury that the contract was that the bill of lading which the Union Bank had got should be treated as a genuine original bill of lading. If the jury should be of that opinion, there would be money paid by the plaintiffs for the defendant's use, and which they would

be entitled to recover. Secondly, I think there was strong evidence of the adoption of the payment. There was a pass-book kept by the *493] defendant and the plaintiffs; *and upon the 2d July, when the plaintiffs were no doubt advised of the acceptance of the bills by the Union Bank of London, they debited the defendant's account with 2400*l*. The account goes on, without any intimation to the plaintiffs of anything wrong, until nearly two years afterwards. It is plain that in this pass-book it was intimated that the defendant should be charged with this 2400*l*., and I apprehend the plaintiffs had a clear right to treat the money paid in afterwards by the defendant as paid in discharge of that debt. That they did by the entries in the pass-book. It would be a question for the jury whether the defendant did not assent to the plaintiffs' appropriating the money paid in on account in discharge of the 2400*l*.; and if the jury so found, there would be an end of the case. In my opinion, those two questions would have been properly left to the jury, and if they had found a verdict for the plaintiffs I should have thought it right. For these reasons, I think that the verdict for the plaintiffs ought to stand.

BRAMWELL, B.—I am of the same opinion. Whether this be a matter of law or of fact, importing one's knowledge of commercial affairs, I come to the conclusion that the plaintiffs are entitled to recover. I agree with the Lord Chief Baron that the defendant's letter to the plaintiffs of the 30th June should be expanded a little (as no doubt it would have been, if written to persons unacquainted with the facts), and then it would have been to this effect—"Mr. Homeyer, of Wolgast, has shipped on board the 'Anna,' 8320 scheffels of wheat on our account, and he has got a bill of lading for the same. He will draw on the Union Bank of London drafts to the amount of 2400*l*., to be accompanied by that bill of lading; we shall feel obliged by your requesting the Union Bank to accept these drafts, the bill of lading being properly endorsed." If the defendant had done that, could he *494] afterwards have said, "I *thought we meant that the bill of lading should be a genuine bill of lading, and consequently I never intended you to accept the drafts unless it was"? He could not have said so, because he assumed that a genuine bill of lading was in existence; and he never could have been heard to say it was the plaintiffs' duty to see whether the instrument was genuine or not. In truth, though the defendant has not written in the terms which I have supposed, he has done very much the same thing; because what he says is this—"We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Homeyer for 2400*l*. against properly endorsed bill of lading of 8320 scheffels of wheat per 'Anna.'" That assumes the bill of lading to be in existence and the shipment to have taken place.

Now, if we look at the good sense of the matter, it seems entirely with the plaintiffs. Where a bill of exchange is drawn on a banker, and made payable to the drawer or his order, and a third person presents it at the bank for payment, the banker indeed has not much opportunity of ascertaining for himself whether the person presenting is the bonâ fide holder of the document, but still the customer of the banker who has requested him to accept the bill is not the holder, and therefore there is something in favour of the liability of the

banker. But in a transaction of this description the banker has not the slightest opportunity of ascertaining whether the bill of lading is genuine, whereas the customer may always make himself safe, for he need never give an order to pay the bills till he has satisfied himself that the goods have been shipped and a genuine bill of lading has issued, and I am sure there would be no practical difficulty in that. Another way of testing the matter is this: Suppose the plaintiffs had no claim against the defendant, then the Union Bank of London would have none against the plaintiffs, and are without remedy. *That ought not to be. Could they claim against Bischoffsheim & Co.? I apprehend not. Bischoffsheim & Co. did not [*495 represent anything, except that they were holders of the bills of exchange. It appears, from the case of *Robarts v. Tucker*, that a person who presents a bill of exchange for payment impliedly represents that he is the bonâ fide holder of it and entitled to receive the amount. It seems that in that case there was a right over against the parties who presented the bill, whereas here there is none against Bischoffsheim & Co.

I come therefore to a conclusion in favour of the plaintiffs, whether I regard the question as a matter of law or fact. Being placed in the position of jurymen we are entitled to draw inferences, and when I take into consideration the facts I in no sense dissent from *Robarts v. Tucker*. I think that decision right, but distinguishable from the present case on the grounds I have adverted to.

With respect to the other point, I own I have some difficulty in saying that the defendant has made himself liable by recognising the payment if he was not originally liable; but I express no definitive opinion upon that. I will only make one observation upon what Mr. *Lush* says was the intention of the parties. I think my Lord has given the proper answer. Something happened which neither party contemplated, and therefore on which neither party had any definite intention. I cannot help thinking, that if the plaintiffs had said to the defendant: "Do you expect us to ascertain whether the bill of lading is a genuine document?" the defendant would have replied: "I do not. I know you would not act on any document which was obviously not a bill of lading. I am satisfied with Homeyer, and will undertake the risk." Upon the grounds I have stated, I am of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

*MEDWAY v. GILBERT. May 29.

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Neither the Common Law Procedure Act, 1852, nor the rules of Hilary Term, 1853, have altered the previous practice by which a plaintiff had the whole of the term next after appearance, whether in term or vacation, to declare.

Notice to declare may be given either in term or vacation.

An action was brought against the drawer, and also against the acceptor of a bill of exchange. In Trinity Vacation, a Judge ordered that the defendant in the action against the drawer be bound by the result of the verdict in the action against the acceptor. That action stood for trial in the following Michaelmas Term, when, by consent, a *stet processus* was entered. In Michaelmas Vacation, the defendant in the action against the drawer served the plaintiff with

a notice to declare in four days, and, he not having done so, the defendant in the following term signed judgment.—Held, that the judgment was irregular, inasmuch as the plaintiff had the whole of that term to declare.

THIS was an action by endorsee against the drawer of a bill of exchange. The plaintiff also brought an action against the acceptors. On the 4th October, 1861, the defendant and also the acceptors obtained an order for leave to appear and defend. A summons having been taken out to consolidate the actions, on the 19th October, 1861, Martin, B., made the following order:—"I do order that the action against the acceptors do proceed, and that the defendant in the other action be bound by the result of the verdict in the action against the acceptors, the acceptors to admit the acceptance; and that the plaintiff be at liberty to sign judgment for debt and costs against the drawer, if he obtains judgment against the acceptors."—The action against the acceptors was set down for trial at the third Sittings in Michaelmas Term, 1861, when it was agreed between the plaintiff and the defendants that a *stet processus* should be entered and the bill of exchange delivered up to the defendants to be cancelled, which was done. On the 24th of December, the defendant gave notice to the plaintiff to declare in this action within four days, otherwise judgment. The plaintiff not having declared, on the 15th of January, 1862, the defendant signed judgment of non pros. An order having been made by Channell, B., at Chambers, that the judgment of non pros. be set aside,

Francis obtained a rule nisi to rescind the order of Channell, B.; against which

*497] *Prentice* showed cause, in last Easter Term (May 12).—First, the Judge's order, by which the actions were consolidated, virtually stayed the proceedings in the action against the drawer until the action against the acceptor was tried and determined; and therefore the notice to declare was irregular. Secondly, the plaintiff had the whole of the next term after the notice was given to declare, and consequently judgment of non pros. was signed too soon. Under the old practice, "it was settled agreeably to the statute 13 Car. 2, stat. 2, c. 2, § 3, that upon all process returnable the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term to deliver his declaration to the defendant's attorney, or leave the same in the office."—Tidd's Prac. p. 422, 9th ed. By the 53d section of the Common Law Procedure Act, 1852, "rules to declare or declare peremptorily, and rules to reply, and plead subsequent pleadings, shall not be necessary; and instead thereof a notice shall be substituted requiring the opposite party to declare, reply, rejoin, or as the case may be, within four days, otherwise judgment." That enactment has not altered the time for declaring, but has merely substituted a notice for the former rule to declare.—(He argued, thirdly, that the notice to declare should have been given in term time, or within sixteen days after it.)

Francis, in support of the rule.—The former practice has been altered by the 53d section of the Common Law Procedure Act, 1852. In Arch. Prac. p. 222, 11th ed., it is said that "the plaintiff has the whole of the term next after the appearance is entered to declare in, and this whether it be entered in term time or vacation." Therefore

in this case the plaintiff was bound to declare in Michaelmas Term, 1861, and the defendant was at liberty to serve the four days' notice to declare in the ensuing *vacation. [WILDE, B.—The question depends on the effect of the order of the 19th October, [*498 1861.] On the 24th of December, when the notice to declare was given, there was nothing to prevent the plaintiff from proceeding in this action. [POLLOCK, C. B.—The order of the 19th of October stayed the proceedings until the result of the other action was ascertained, so that, in considering this question, the intermediate time cannot be taken into account.] *Cur. adv. vult.*

MARTIN, B., now said—This was a rule to rescind an order of my brother Channell, setting aside a judgment of non pros. We are of opinion that the order was correct, and that the rule must be discharged.

The circumstances are these:—The plaintiff, who was endorsee of a bill of exchange, brought this action against the defendant, the drawer of the bill, and also an action against the acceptors. Upon an application to me at Chambers, I ordered that the two actions be consolidated, and that, in the event of the plaintiff being successful in the action against the acceptors, he should be at liberty to sign judgment in the action against the drawer. The action against the acceptors stood for trial, when a stet processus was entered. The defendant afterwards served the plaintiff with notice to declare in this action within four days, and, he not having done so, the defendant signed judgment of non pros., and the question is whether that judgment is regular. We think it is not.

The old rule was, that a plaintiff had the whole of the next term after the defendant's appearance to declare. That practice was not altered by the rules of Hilary Term, 1853. The rule, being one of practice, ought to be acted upon; and the proceedings in this action having been stayed to abide the verdict in the other action, the plaintiff *had the whole of the Term after the stet processus was entered to declare in this action. The defendant gave the [*499 plaintiff the notice which, by the 53d section of the Common Law Procedure Act, 1852, is substituted for the former rule to declare; and it was contended that the notice was not only too soon, but that the four days required by that section should be four days in term. We think that the notice was given too soon, but that it is not necessary that the four days should be in term. There is nothing to require it, and for this purpose the days out of term and in term are the same.

The result is that my brother Channell's order was right, and the rule must be discharged; but, as it was a matter fit to be discussed in Court, the costs of the rule must be costs in the cause.

Rule discharged.

TRINITY VACATION, 26 VICT. 1862.

SARAH BUSH and Another v. BEAVAN. *June 28.*

A claim to a writ of mandamus under the 68th section of the Common Law Procedure Act, 1854, cannot be sustained if there is any other equally effectual remedy.

In an action by executors against the clerk of Commissioners for putting into execution a Town Improvement Act (2 & 3 Vict. c. lxiii.), and in which action the plaintiffs claimed a writ of mandamus under the 68th section of the Common Law Procedure Act, 1854, the declaration stated that the Commissioners were indebted to the testator for the "agreed salary" payable by them to him for services rendered by him as clerk to the Commissioners; and also for other work by him "as the attorney of and otherwise for" the Commissioners in and about the business of the Commissioners. The declaration then alleged "that the said debts became and were a charge on any moneys which might be in the hands of the Commissioners, and which should have been collected by them under and by virtue of the said Act;" and if the Commissioners should not have in their hands any moneys sufficient to pay the said debts, then such debts became a charge and were chargeable on a rate leviable and to be levied by the Commissioners under the Act." The defendants pleaded to so much of the debts as became due on simple contract, the Statute of Limitations, and to the debts, except the agreed salary, that no signed bill was delivered: also that the Commissioners had no funds whereout they could pay the debts.—Held: First, that the declaration was bad, inasmuch as assuming that the services in respect of which the "agreed salary" was claimed were payable out of the rates, the others might be services for which the Commissioners were personally liable, and consequently the remedy was by action, not by claim of mandamus.

Secondly, that on the same principle the two first pleas were good.

Semble, that the last plea was also good.

DECLARATION by the plaintiffs, executors of John Bush deceased, against the defendant, as and being the clerk to the Commissioners for putting into execution the provisions of an Act of Parliament made and passed, &c. (2 & 3 Vict. c. lxiii.), intituled "An Act for paving, lighting, watching, and improving the town of Bradford in the county of Wilts:." For that after the making and passing and coming into force of the said Act of Parliament, and in the lifetime of the said J. Bush, deceased, the said Commissioners became and were indebted to the said J. Bush, deceased, in debts and moneys for the agreed salary of the said J. Bush, payable by the said Commissioners to the said J. Bush in his lifetime, for the services of the said J. Bush by him in his lifetime done and rendered for the said Commissioners as the clerk to the said Commissioners duly nominated and appointed in that behalf by the said Commissioners under the provisions of the said Act, and *upon retainer of the said Commissioners, and at their request.

*501] Also for other the work and labour, journeys and attendances of the said J. Bush by him in his lifetime done, performed, made, and given, as the attorney and solicitor of and otherwise for the said Commissioners on their retainer and at their request, in and about the business of the said Commissioners, and for fees due and of right payable to the said J. Bush in his lifetime, in respect thereof, by the said Commissioners, and for money and materials and necessary things by the said J. Bush in his lifetime provided, and expended, and used in and about the said work and labour and journeys for the said Commissioners, and at their request. And for money paid by the said J. Bush in his lifetime for the use of the said Commissioners, at their

request. And for money found to be due from the said Commissioners to the said J. Bush on accounts in his lifetime stated between the said J. Bush and the said Commissioners of and concerning the moneys due to the said J. Bush for the aforesaid work and labour, moneys expended, materials provided, and moneys paid, which said debts and moneys before and at the time of the death of the said J. Bush were and remained due and owing to him, and still remain due and owing to the plaintiffs as such executors as aforesaid. And the plaintiffs say that, the same debts and moneys being and remaining so due and owing to them as such executors as aforesaid, the same debts and moneys became and were and are a charge and chargeable upon any moneys and funds which might be in the hands of the said Commissioners, and which should have arisen and been collected by them under and by virtue of the said Act, and if the said Commissioners should not have in their hands any such moneys and funds sufficient to pay and satisfy such debts and moneys so due and owing to the plaintiffs as such executors as aforesaid, then the said debts [*502 and moneys became and are a charge and chargeable upon a rate and assessment leviable and to be levied and collected by the said Commissioners under the provisions of the said Act. And the plaintiffs further say that, by reason of the said debts and moneys being still owing to them as such executors as aforesaid, they became and were and are, as such executors, personally interested therein, and also personally interested in any such moneys and funds which may be in the hands of the said Commissioners, and which should have arisen and been collected by them under and by virtue of the said Act, and if the said Commissioners should not have any such moneys and funds sufficient to pay and satisfy such debts and moneys to the plaintiffs as such executors as aforesaid, personally interested in the rating and assessing, and collecting and levying a rate to be charged and chargeable with the payment to the plaintiffs as such executors as aforesaid of the said debts and moneys so due and owing to them as aforesaid, within the meaning of the Common Law Procedure Act, 1854, to wit, to the amount of all the moneys so due and owing to them as executors as aforesaid. And the plaintiffs say that, being so interested, afterwards and within a reasonable time in that behalf before the commencement of this suit, they demanded of and requested the said Commissioners to pay and satisfy the plaintiffs as such executors as aforesaid the said debts and moneys so due to them out of any such moneys or funds as aforesaid, if any, in their hands available for that purpose, and if the said Commissioners had not any such moneys or funds in their hands available for such purpose, then the plaintiffs demanded and requested the said Commissioners to levy a rate under the powers of the said first-mentioned Act for the purpose of the payment of such debts and moneys so due and owing to them as aforesaid, but that the said *Commissioners have [*503 wholly neglected and refused so to do, and the plaintiffs as [*503 such executors as aforesaid, by reason of the non-performance by the said Commissioners of their duty in that behalf, have sustained damages to the amount of all the debts and moneys so due and owing to them as aforesaid, and therefore the plaintiffs claim a writ of mandamus commanding the said Commissioners to pay and satisfy the

plaintiffs, as such executors as aforesaid, the said debts and moneys so due and owing to them as aforesaid out of any such moneys or funds as aforesaid, if any, in their hands available for that purpose, and if the said Commissioners have not any such moneys or funds as aforesaid in their hands available for such purpose, then commanding the said Commissioners to assess and levy a rate under the powers in the said first-mentioned Act for the purpose of the payment of the said debts and moneys so due and owing to them as such executors as aforesaid.

Third plea.—The defendant, to so much of the plaintiff's alleged debts and moneys as became due upon simple contract, says that the said cause of action hereby pleaded to did not arise or accrue within six years before the commencement of this suit.

Fourth plea.—The defendant, as to the debts and moneys claimed, except the said agreed salary, says that this action was commenced after the passing of the Act of Parliament, passed in the seventh year of the reign of Queen Victoria for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales, and is, so far as it is pleaded to by this plea, maintained for the recovery of fees, charges, and disbursements for business done by the said J. Bush, deceased, as an attorney and solicitor for the said Commissioners, and the plaintiffs did not nor did the said J. Bush one calendar month before action deliver to the said Commissioners (being the party *to be charged therewith), or *504] send by post to or leave for them at their counting-house, office of business, dwelling-house, or last known place of abode, any bill of such fees, charges, and disbursements, subscribed with the proper hand of the plaintiffs, or either of them, or of the said J. Bush, deceased, either with their or his name, or with the name or style of any partnership, or enclosed in or accompanied by a letter subscribed in like manner referring to such bill as required by the said statute.

Tenth plea.—The defendant, to so much of the declaration as relates to the said claim for a mandamus, says, that the debts and moneys in the declaration mentioned accrued due many years before the commencement of this suit, that is to say, part thereof, to wit, 15*l.* 4*s.* 9*d.*, accrued in or prior to the year 1841, other part thereof, to wit, 266*l.* 13*s.* 2*d.*, in or prior to the year 1850, and the residue thereof, to wit, 145*l.* 16*s.* 8*d.*, in or prior to the year 1857. And the defendant further says, that the said Commissioners had not, at the time of the accruing of the said debts and moneys, nor have they at any time since had, any funds or moneys in hand applicable to the plaintiff's claim, and that they have duly collected, as far as it is possible to collect the same, all moneys and rates which they are authorized to levy and collect, and that they have duly applied and expended all funds and moneys which have ever come to their hands as such Commissioners as aforesaid, in and according to the manner provided by the said Act of Parliament, except a small part thereof, and that such moneys and funds so remaining in their hands are required by and have, in the bonâ fide exercise by the said Commissioners of their discretion, been set apart for the purpose of satisfying, according to the said Act of Parliament, other just claims upon the said Commissioners which

have arisen and accrued long since the debts and *moneys in the declaration mentioned, and which the said Commissioners [505 are bound, under the said Act, to pay and satisfy out of such funds and moneys as far as the same will extend. And the defendant further says, that the whole amount of any funds or moneys that could be raised and collected by the said Commissioners by any rate heretofore made, or to be made and levied, as in the declaration mentioned, would be required by the said Commissioners to meet the said just claims, and the interest and current costs, charges, and expenses of the year in which such rate might be made and levied, and other than the claim, debt, and causes of action in the declaration mentioned. And the defendant further says, that the moneys which by the said Act the said Commissioners are empowered to raise in any one year, have not been at any time, and will not be, more than sufficient to pay and satisfy the aforesaid interest and necessary current costs, charges, and expenses of the year, and that there never has yet been, and is not likely to be, any surplus in the hands of the said Commissioners or receivable by them, whereout the said Commissioners could pay or satisfy the debts and moneys in the declaration mentioned.

Demurrer to so much of the declaration as relates to the said claim for a mandamus.—Joinder therein.

Demurrer to the pleas.—Joinder therein.

Phipson (*H. Bullar* with him), for the defendant.—The claim for a mandamus is bad. With the exception of the "agreed salary," payable by the Commissioners to the testator for his services as their clerk, the alleged debts are in respect of services, not chargeable on the rates, but for which the Commissioners are personally liable. By the 68th section of the 17 & 18 Vict. c. 125, the plaintiff in any action, except replevin and ejectment, may endorse on the *writ that [506 he intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration "a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." Here there is no duty on the part of the Commissioners which may not be enforced by action; for this is merely a case of non-payment of simple contract debts. By the 13th section of the 2 & 3 Vict. c. lxiii., the Commissioners may appoint a clerk and other officers; and may, out of the moneys which shall arise and be collected by virtue of that Act, allow and pay to such officers such salaries or allowances as the Commissioners shall think reasonable. By the 16th section, the Commissioners may sue and be sued, for or in respect of any matter or thing relating to that Act, in the name of their clerk. By section 69, "for raising money to defray the expenses attending the obtaining of that Act, and of carrying into execution the several purposes thereof," the Commissioners are empowered to make an equal rate, not exceeding 2s. 6d. in the pound, upon the occupiers of all houses, &c., within the town; but the 71st section empowers the ratepayers, in case it is not sufficient, to increase it to 5s. The 94th section prescribes the mode in which the rates shall be applied; viz., in the first place, in paying the interest of moneys due and owing on the credit of the rates, then in defraying the costs, charges, and expenses of paving, cleansing, lighting, draining,

and watering the several streets, &c., and of carrying the several other purposes of the Act into execution, and afterwards of paying off the principal of moneys due and owing on the credit of the rates, "and for no other use, intent, or purpose whatsoever." Then how are the plaintiffs in a different position from any other creditor? If the debts were incurred by the Commissioners within the scope of their authority, the plaintiffs have a remedy by action against their clerk: *Kendall v. *King*, 17 C. B. 483 (E. C. L. R. vol. 84), *Hall v. Taylor*, E. B. & *507] E. 107 (E. C. L. R. vol. 96), and a judgment against him would create a duty which might be enforced by mandamus; *Regina v. The Local Board of Health of Rotherham*, 8 E. & B. 906 (E. C. L. R. vol. 92). But there is no instance of a mandamus having been granted where the sum claimed might be recovered by action of debt. If it were, the Statute of Limitations might be defeated, for that statute is no bar to a writ of mandamus: *Ward v. Lowndes*, 1 E. & E. 940 (E. C. L. R. vol. 102). In *Regina v. The Hull and Selby Railway Company*, 6 Q. B. 70 (E. C. L. R. vol. 51), the Court refused to grant a mandamus because the party had an equally effectual remedy by action of debt. The claim to the writ is in respect both of the agreed salary and the services for which the Commissioners are personally liable, and therefore the declaration, being bad as to part, is bad altogether. Moreover, assuming that the agreed salary might be paid out of the rates, there is no specific fund charged with the payment of it. In *Hall v. Taylor*, the Act expressly authorized the Commissioners to pay the wages, salary, and allowances of their officers out of moneys to be raised. Here there is no obligation on the part of the Commissioners to pay any particular creditor, or to levy rates for that purpose, at all events until judgment has been obtained in an action of debt against their clerk.—(He reserved the argument in support of the pleas until the question as to the mandamus was disposed of.)

Coleridge (with whom were *Lush* and *Lopez*), for the plaintiffs.—First, the claims of the plaintiffs are, in effect, charges on the rates, and therefore enforceable by mandamus. This case is distinguishable from *Kendall v. King*, 17 C. B. 483 (E. C. L. R. vol. 84). There the "Committee of Visitors" were authorized by the 8 & 9 Vict. c. 129, to contract for plans for the erection of a *lunatic asylum, and they *508] were enabled to sue and be sued in the name of their clerk. Therefore, the proper remedy for a breach of contract was by an action against them in the name of their clerk; and, when judgment was obtained, that would create a duty to pay which might be enforced by mandamus. But here there is no occasion for such a circuitous mode of proceeding, because the 69th section of the 2 & 3 Vict. c. lxiii., has created a duty on the part of the Commissioners within the meaning of the 68th section of the Common Law Procedure Act, 1854. [MARTIN, B.—A landlord might as well ask for a mandamus to compel a tenant to pay his rent.] It is not contended that mandamus will lie where the debt might be recovered by action, but it is no objection to an application for a mandamus, that the object is to enforce payment of a debt. Secondly, the Statute of Limitations does not apply. The writ of mandamus given by the 68th section of the Common Law Procedure Act, 1854, is founded on the same principle as the prerogative writ of mandamus, viz. that there is a duty which

the party is bound to perform; and in such a case the Statute of Limitations cannot be pleaded: *Ward v. Lowndes*, 1 E. & E. 940 (E. C. L. R. vol. 102). [MARTIN, B.—In that case there was a duty, properly so called.] The relation of debtor and creditor existed as much in that case as in this. Thirdly, the same observation will apply to the plea that no signed bill was delivered. Fourthly, as to the plea that the rate would be retrospective, the cases of *Regina v. Read*, 13 Q. B. 524 (E. C. L. R. vol. 66), and *Harrison v. Stickney*, 2 H. L. 108, are authorities that such a rate may be made.

Phipson, in reply, was stopped by the Court.

Cur. adv. vult.

The judgment of the Court was now delivered by

*CHANNELL, B.—This was an action brought by the executors of one John Bush, against the defendant, “as and being [*509 the clerk to the Commissioners for putting into execution the Act for improving the town of Bradford, in which action the plaintiffs claimed a writ of mandamus under the Common Law Procedure Act, 1854. The declaration stated that, in the lifetime of the testator, the Commissioners became and were indebted to him for the “agreed salary” payable by them to him for services rendered by him as clerk to the Commissioners, and also for other work, &c., by him “as the attorney of, and otherwise, for” the Commissioners in and about the business of the Commissioners. The declaration alleges that the said debts became and were a “charge on any moneys which might be in the hands of the Commissioners, and should have been collected by them under and by virtue of the said Act.” And if the Commissioners should not have in their hands any moneys sufficient to pay the said debts, “then such debts became a charge, and were chargeable, on a rate leviable, and to be levied, by the Commissioners under the Act.” There is no allegation of matter of *fact* than as above, to show that the debts became so chargeable. The declaration then, after an allegation that the plaintiffs, as executors, were “personally interested” in the rates (which of course they would be assuming such a charge, but which rests entirely on the same legal ground as the allegation of the charge itself), goes on to aver a request to the Commissioners to pay or to levy a rate to pay the said debts, and their neglect and refusal so to do, and then claims a writ of mandamus to compel them to pay out of any funds in their hands or to make a rate for the purpose.

To this declaration the defendant pleaded (*inter alia*) a plea, as to so much of the debts as became due on simple contract, that the cause of action did not accrue within six *years, and a plea of [*510 the Attorneys Act, and also a plea to raise the question whether the Act allows of a retrospective rate. These pleas have been demurred to by the plaintiffs,—the two former on the ground that the statutes pleaded do not apply to the “action of mandamus.”

The declaration is objected to on the ground that it shows no right to a mandamus. It is manifest that this is the main question in the case.

The Local Act, 2 & 3 Vict. c. lxiii., by section 13 provides that the Commissioners, at any meeting, may nominate and appoint a clerk, * * * and such other officer for the execution of the Act, and may, out

of the moneys to be collected under the Act, pay to such officers such salaries and allowances as the Commissioners think reasonable. As the Commissioners in the execution of the Act would or might have to build sewers and other works, pave streets, and keep them in repair, provide engines, lamps, &c., it is obvious there would or might be a necessity for various other officers besides those specially mentioned in the Act, and of a permanent character, such as an engineer, a surveyor, a superintendent of firemen, a scavenger and the like; and there is a distinction between the employment of such "officers" and the casual services of others, such as attorneys, who might be from time to time employed by the Commissioners, more or less, for the purposes of the Act or other business arising out of their acts as Commissioners.

Beyond the agreed salary of the clerk, who may or may not be an attorney, there is no power to pay out of the rates for the services of an attorney, simply as such, save so far as it may be gathered from the section referred to, and the general terms of the rating clause (sect. 69), to make rates to defray the expense of "carrying into execution the several purposes of the Act;" or from a subsequent *511] *clause (sect. 94) in "paving, cleansing, lighting, draining, and watering the streets and places of the town, and otherwise improving the same, and of carrying the other purposes of the Act into execution."

In respect to the power of the Commissioners to make sewers, provision is made, by sect. 28, for compensation to persons injured or damaged by the necessary works; and, in sect. 31, there is a power to take stone on lands not garden ground, &c., paying compensation. Of course the legal expenses in proceedings within the powers of the Act would as much be within the scope of the rating clause, "as expenses of carrying the Act into execution," as the payment of the compensation itself.

But in cases of works by which parties were unnecessarily injured, and for which they might maintain actions, or in cases of materials unlawfully taken, the Commissioners might be liable, or such of them as authorized the Acts; and the expenses thereby incurred could not be charged on the rates as the expenses of carrying "into execution the purposes of the Act."

So, as to their powers under sect. 41 to lay gas-pipes; they are, under sections 42 and 43, expressly made liable for letting gas escape, or letting foul liquid run into the river, &c., and so, in sect. 44, as to contamination of water by gas; and sect. 46 expressly provides that nothing in the Act is to prevent the Commissioners from being indicted for a nuisance. Expenses incurred by the Commissioners in defending such indictments or other proceedings for wrongful acts of theirs not authorized by the Act, could hardly be deemed expenses of carrying out the *purposes* of the Act, and therefore could not be paid out of the rates.

It is not necessary to notice any more of the provisions of the Act except that, in sect. 16, it is provided that the Commissioners "may sue and be sued, for or in respect of any matter or thing relating to this Act, in the name of their *512] clerk for the time being," the clerk to be paid out of the moneys to be raised by virtue of the

Act all such damages, costs, and charges as he shall be put to, by reason of his being so made plaintiff or defendant, and shall not be personally answerable or liable for the payment of the same unless the suit shall arise in consequence of his own wilful neglect or default, or shall have been brought or defended without the order or direction of the Commissioners.

This proviso implies, we think, what has already been intimated, namely, that there may be cases in which wrongful acts had been done, which the Commissioners as a body disclaimed or might disclaim, and which had not been done in pursuance of any directions or order of theirs; nor by any one engaged in the carrying out of their directions and for which, therefore, the persons, Commissioners or others, who had done or directed such acts would be personally liable, and for the same reason, the clerk, as representing the Commissioners, could not be rightly sued, and so could obtain a verdict and his costs; or, even if it should appear that the Commissioners were by reason of the assent of any five of them liable for the acts complained of, the effect of the Commissioners, as a body, declining to direct the clerk to defend, would be, practically, that, as the costs and damages could not, then, come out of the rates, they would be thrown upon such Commissioners as had directed the acts, and who therefore would be made personally liable both for the damages and the costs of the defence.

There are then various ways in which we think the Commissioners might retain the services of an attorney in matters relating to their duties and their business as Commissioners, and yet for such services they could not charge the rates and would be personally liable.

The allegation in the declaration on which the whole depends is, that the Commissioners became indebted to the testator for agreed salary as their clerk and also for services ^{as} attorney and otherwise rendered by him on their retainer and in and about ^{[*518} their business, that is, the retainer and business and request of "the Commissioners," not saying *as such Commissioners*.

Now, as regards the first head of claim, the "agreed salary as clerk to the Commissioners duly nominated and appointed in that behalf," that might probably be brought within the express power to pay salaries of officers out of rates; but there is a great distinction between that and the other head of claim for services to the Commissioners which might have been services for which they would have no authority to pay out of the rates, and for which they would only be personally liable. The pleas proceed on this distinction, the plea of the Statute of Limitations being to so much of the said debts as are on *simple contract*, whilst the plea of the Attorneys Act is except as to the agreed salary.

The claim for services as distinct from agreed salary is one for which the Commissioners might only be personally liable and for which the rates might not. Assuming this distinction to be correct, the argument on the part of the defendants was that the claim of the writ being entire and referring to *both* the debts, the declaration must be deemed entire, and if bad in part was bad in toto.

But it was further argued, on the part of the defendant, that although, as to the claim for the agreed salary, it might be one that could be

paid out of the rates, yet no specific fund was charged with the payment of the debts claimed by the plaintiff, and there was no obligation to pay any particular creditors nor to raise rates for the purpose, and that there would be no such duty or obligation at least until the Commissioners had been sued by their clerk in an action of debt and judgment recovered against them.

In *Benson v. Paul*, 6 E. & B. 273 (E. C. L. R. vol. 88), it was held *514] that the right to a *mandamus does not extend to the fulfilment of duties arising from mere personal contract. And though, in the subsequent case of *Norris v. The Irish Land Company*, 8 Q. B. 512 (E. C. L. R. vol. 55), it was held that the remedy is not restricted to cases where the old writ of mandamus would have lain, no case seems to have done away with, in respect of the action of mandamus, the doctrine which always applied to the writ of mandamus, that it does not lie where there is any other remedy.

Thus, in the case cited and relied on by the counsel for the defendant, *Kendall v. King*, 17 C. B. 483 (E. C. L. R. vol. 84), where an action was brought by an architect against a committee of visitors of county asylums in the name of their clerk, on a contract entered into by a former committee, it was held that the action would lie, and, per Williams, J., that the judgment would be enforceable by mandamus, the clerk not being personally liable. The case of *Hall v. Taylor*, E. B. & E. 107 (E. C. L. R. vol. 96), ends to the same conclusion.

In *Ward v. Lowndes*, 1 E. & E. 940, 956 (E. C. L. R. vol. 102), the debt had been originally incurred by Commissioners under a local Act, and their property had been by statute transferred to the Board of Health, and, by implication, the debt was thus charged on the rates; and though the Commissioners might originally have been personally liable, clearly the Board of Health was not, and as regards them the debt was *only* a charge upon the rates. That was the ground of the decision in the Court of error that mandamus would lie. The Court held in effect that it was not a charge or expense incurred by the Board, and, per Byles, J., "mandamus lies where there is a duty to perform and no means of enforcing it by action."

It was further said, "the debt was there charged on the rates by *515] statute, and an implied power was given to make a *rate to raise the money." Of course, where the statute had created the charge, it created a duty to liquidate it and to levy rates for the purpose, and, as was said per Erle, C. J., "there are no means to enforce the levying of a rate but by mandamus." And if the only remedy is by enforcing the levying of a rate, of course the remedy must be by mandamus.

But as regards a portion of the present claim there is nothing sufficient to show that it could be lawfully levied out of the rate. And even as regards the claim for salary, which perhaps might be, it by no means follows that it could not be recovered by action of debt, and that there was no other remedy than by enforcing the levying of a rate.

As regards the claim for services as an attorney, assuming them to have been retained by the Commissioners within the scope of their authority as such, then, as in *Kendall v. King*, an action would lie against their clerk on their behalf, and on the judgment a mandamus

would lie, for the judgment would affirm a debt or duty from the *Commissioners* as such. But until then non constat that there is any *such* debt or duty; but only a *claim* of it, the proper remedy for which is the action of debt. And although, no doubt, in *Ward v. Lowndes* it was held that where a debt is of such a nature that a mandamus will be granted to enforce it, and is the proper remedy, the *amount* may be ascertained in the action of mandamus, neither that nor any other case has, that we are aware, determined that the *claim* to the debt or duty may be litigated therein. On the contrary, the language of the Common Law Procedure Act, 1854, sect. 68, rather excludes this view, for it enacts that an action of mandamus shall lie to compel the performance of a duty, and it thus assumes and implies that the duty exists when the action is brought and the **claim* to a [*516 mandamus is inserted in the writ. Now, the mandamus in this case is to pay out of the rates, or to levy rates for the purpose. It is objected that the writ is bad for being in the alternative. But passing this by, both branches of the alternative assume and imply a legal duty, when the writ of mandamus issued, to pay these claims out of the rates, or levy rates for the purpose, and this without even alleging that the services were rendered to, or on the retainer or request of the Commissioners *as such*, or for business in carrying out the purposes of the Act. Assuming the services not to have been "in execution of the powers of the Act," then they would not be even payable out of the rates.

As the Commissioners are a fluctuating body, and it is possible that the present Commissioners know not whether the services now claimed for were in execution of the purposes of the Act, and so payable out of the rates, there could hardly be a legal duty on them to pay for those services out of the rates, and make rates for the purpose before that had been legally determined.

It is true that in the declaration there is an averment that the Commissioners were indebted for services rendered in their retainer in and about the business of the said Commissioners, but it is nowhere alleged that they were indebted as *such* Commissioners, for services done in carrying the Act into execution; and, even if it were so, that would only be uniting in one and the same claim an action of debt with one of mandamus.

It is clear, according to *Kendall v. King*, that an action would lie against the clerk of the Commissioners, assuming the services such as would be properly payable out of the rates; and then that a remedy by mandamus may be had on the judgment: but if the services were not such as would be payable out of the rates, it is clear that no action **would* lie against the Commissioners by their clerk at all, and [*517 that there could be no recourse to the rates, and of course in that case no remedy by mandamus.

It seems to us to follow that the declaration is bad, and on the same principle that the two former of the pleas demurred to are good.

In *Ward v. Lowndes* it was held that there is no statute of limitations which can be taken as applying to the action of mandamus (and a similar remark would apply to the plea of the Attorneys' Act). If we hold the case to be one for a mandamus, when, until a judgment has been recovered, the remedy is by action of debt, we deprive a

party of defences which, whilst the debt is in dispute, he has a right to resort to.

Taking the view we do, that the declaration is bad, we think it unnecessary to determine as to the last of the three pleas demurred to, which raises the question whether the rate might be retrospective. Probably that question would be found very much to resolve itself however into that which we have already determined.

In the opinion of the Lord Chief Baron and myself the judgment of the Court should be for the defendant. My brothers Martin and Bramwell were not present during the whole of the argument, and therefore decline taking any part in the judgment.

Judgment for the defendant.

*518]

*LEWIS v. PEACHEY. *June 25.*

Where there is a contract of apprenticeship by deed, and the apprentice unlawfully quits the service, the master can only recover damages up to the time of action brought, and not prospective damage up to the time when the term of apprenticeship would end.

DECLARATION on an indenture, whereby the defendant covenanted that his son should faithfully serve the plaintiff, as an apprentice, for the space of five years.—Breach: that the son, during the term, unlawfully absented himself from the service of the plaintiff.

Plea (inter alia).—That the defendant's son did not unlawfully absent himself as alleged.

At the trial, before Channell, B., at the last Shropshire Spring Assizes, it appeared that the plaintiff was a grocer, and that, by indenture (in the usual form), the defendant's son was bound apprentice to him for five years from the 1st May, 1860. The son remained in the plaintiff's service until the 18th of January, 1862, when, disputes having arisen between them, he left with the defendant's sanction, but against the will of the plaintiff, and had not since returned. The writ in the present action issued on the 10th of February, 1862.

It was submitted, on behalf of the defendant, that the plaintiff was only entitled to damages for the loss of service from the time the apprentice absented himself until the time the writ issued. It was contended, on the part of the plaintiff, that the absence of the apprentice was not of a temporary nature, but that the defendant intended to determine the apprenticeship, and therefore the plaintiff was entitled to damages for the absence from the time the apprentice left until the service would terminate by the indenture.

The learned Judge directed the jury to assess the damage for the respective periods separately. The jury found 10s. damages for the
*519] absence up to the time the writ issued, and *35*l.* damages for the remainder of the term. A verdict was then entered for the plaintiff for 35*l.* 10s., leave being reserved to the defendant to move to reduce the damages to 10s.

Pigott, Serjt., in the following term, obtained a rule nisi accordingly, on the ground that prospective damages for the remainder of the term of the apprenticeship were not recoverable.—He cited *Hambleton v. Veere*, 2 Saund. 169.

Gray (*Huddleston* with him) now showed cause.—The plaintiff is

entitled to recover the full amount of damage found by the jury. The defendant having allowed his son to absent himself from the plaintiff's service, the plaintiff has a right to treat the indenture of apprenticeship as at an end, and sue for damages up to the time the apprentice contracted to serve. It will be said that the plaintiff ought not to recover prospective damages, because the apprentice may return to the service. But in that case the plaintiff would have to wait during the whole term before he could fill up the vacancy. A party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract, and an action will lie for such breach before the time for the fulfilment of the agreement: *Hochester v. De La Tour*, 2 E. & B. 678 (E. C. L. R. vol. 75). If the plaintiff recovers the full amount claimed, the judgment in this action will be a bar to any future action; whereas, if he only recover damages up to the time the writ issued, he might bring successive actions at different periods.

W. H. Cooke, for the defendant.—The case of *Hughes v. Humphreys*, 6 B. & C. 680 (E. C. L. R. vol. 13), is an authority that the deed is not determined by the apprentice quitting the service; and so long *as it remains in force, the plaintiff can only recover damages up to the time the writ issued. The plaintiff might at any [*520 time compel the apprentice to return to his service. Moreover, the declaration is only framed so as to recover damages for the loss of service up to the time the action was brought.

POLLOCK, C. B.—This case is altogether different from that of a servant who is engaged under a parol contract which the master refuses to perform, in which case the servant may recover damages for the entire term. Here the contract is by deed, which remains in force notwithstanding the apprentice has absented himself from the service. The rule must therefore be absolute to reduce the damages to 10s.

BRAMWELL, B.—I am of the same opinion. The action is brought to recover the damage occasioned by the apprentice having absented himself from the service of his master, and the question is whether the master is entitled to recover damages up to the time when the service would terminate. In my opinion, he is not at liberty to give up the service of his apprentice and recover damages instead. If, indeed, the parties had gone to trial with an admission that the deed of apprenticeship was at an end, the case might have been different. But, looking at all the circumstances, I think that the plaintiff is only entitled to recover for the loss of service up to the time the writ issued.

CHANNELL, B., concurred.

WILDE, B.—I am of the same opinion. The difficulty is created by this being a contract by deed, which is still in force. If it had been a parol contract, our judgment might have been the other way. But the plaintiff cannot recover *damages for the absence of [*521 his apprentice up to the end of the term while, at the same time, he has a right to his services.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

BRADLEY v. DUNIPACE. June 25.

A flour Company abroad shipped on board a vessel, of which the defendant was master, 1676 bags of rye meal, some of which weighed twelve stone each and some eight stone each. They were shipped from lighters, all mixed together, and the master knew nothing of their relative capacity. The master signed two bills of lading, one for 1209 bags and the other for 467 bags, deliverable to order. The latter bill of lading was for 467 bags rye meal, gross 35 tons, 9 cwt., and at the foot of it was "contents unknown and not responsible for weight." The bags were all marked alike, and no means were taken to identify by marks in the bills of lading any particular bags, and there was nothing on the face of the bills of lading from which the master could see that they were intended for different consignees. When the ship arrived the defendant by mistake delivered to the plaintiff, who was consignee of 467 bags of twelve stone each, several bags which weighed only eight stone.

Held, in the Exchequer Chamber, that the master was responsible for the non-delivery of 467 bags of the proper weight.

THIS was an appeal against the decision of the Court of Exchequer in discharging a rule to enter the verdict for the defendant, pursuant to leave reserved at the trial (reported 7 H. & N. 200†). The case stated on appeal was (so far as material) as follows:—

1. This was an action by the plaintiff, as endorsee of a bill of lading, against the defendant, as master of a ship called "The Hawk," for not delivering the proper quantity of goods according to the bill of lading.

2. "The Hawk" was a steam-vessel trading between Stettin and Hull with general cargoes, and on the 7th of June, 1860, whilst at Stettin taking in a general cargo there, a Flour Company, at Stettin, called "The Stettin Steam-Mill Company," shipped on board the said vessel 1676 bags of rye meal. These bags weighed some of them twelve stone each and some eight stone each. But except what is *522] stated in the bills of lading hereinafter referred to, or might be *gathered from the appearance of the bags, the master was told nothing of their relative weight and capacity.

They were not weighed when put on board, and it was admitted that no weighing ever takes place on board steamships on taking in cargoes. They were all sent on board together in lighters and mixed up together as one lot without reference to their size, and all the bags were marked with the same mark, the mark of the Flour Company.

3. Nothing was said or done at the time of shipment to indicate that the 1676 bags were intended to be separated into two lots or that they were intended for different consignees, except as appears by the bill of lading. They were accordingly stowed as they were delivered on board, having only regard to the trimming of the ship. Before sailing, the master had two separate sets of bills of lading put before him for signature, one for 1209 bags, weighing 65 tons gross, and the other for 467 bags, weighing 35 tons 9 cwt. gross English weight, making together the 1676 bags before mentioned.

The bill of lading for the 467 bags, and on which this action was brought, was in the following words:—

"I, Dunipace, from Hull, captain of the steamer ship called the 'Hawk,' which is now loading in Stettin in order to sail to Hull (where my discharge is to take place), certify that I have received in the hold of the said ship from the Directory of the Steam-Mill Joint Stock Company (467) four hundred and sixty-seven bags rye meal or bran, gr. 35 t. 9 cwt. gross, thirty-five tons and nine hundred weight English weight under the subjoined marks, good and well conditioned, in order (if God give me a safe voyage) to deliver them in the like good condition at Hull to order, on payment of the freight of (15) fifteen shillings British sterling per ton in full, and average accustomed. For the fulfilment hereof I pledge my person, goods, and the ship with all *appurtenances, whereof I have signed two bills of lading of like contents only availing as one. [*523

"Stettin Steam
Mills Joint
Stock Com-
pany Corn
Mill."

"Stettin, 7 June, 1860.

"ROBERT DUNIPACE."

"The goods to be taken out within twenty-four hours after the ship's arrival or to pay ten pounds per day demurrage, and the goods may be discharged and landed by the broker at the risk and expense of the receivers; contents unknown, and not responsible for weight, measure, leakage, breakage, or damage."

5. The bill of lading for the 1209 bags was in a similar form, the weight being stated therein as follows:—

"35 tons gross, sixty-five tons English weight."

6. There were no means taken by the shippers to identify, by marks in the bills of lading or otherwise, any particular bags as the subject of either bill of lading particularly, and nothing took place from which the master could see they were intended for different consignees.

7. When the ship arrived at Hull the defendant delivered 465 bags to the plaintiff as endorsee of the bill of lading mentioned in this action.

This was two bags short of the plaintiff's number, but the defendant paid into Court the sum of 17. 10s. to cover their value, which was admitted to be sufficient for that purpose.

8. Of the 465 bags delivered to the plaintiffs some were twelve stone bags and others eight stone bags, and the whole in the aggregate weighed only 30 tons 9 cwt. and 12 lbs. And this action was brought by the plaintiff for the value of the difference in quantity between that weight and the weight stated in the bill of lading to have been received on board.

13. The Court is to be at liberty to draw all inferences *that a jury would be justified in drawing from the facts above stated. [*524

14. The question for the opinion of the Court is, whether or not the defendant is entitled to have the verdict entered for him; if the Court shall be of opinion in the negative, then the verdict for the plaintiff to stand, and judgment to be entered for him for the damages assessed by the jury, with costs of suit. If the Court shall be of opinion in the affirmative, then the verdict for the plaintiff to be set

aside and entered for the defendant, with judgment for the defendant accordingly.

Overend (with whom was *Quain*) now argued for the defendant. (a) —The contract which the defendant entered into by the bill of lading was to deliver 467 bags, under the subjoined marks, and he has fulfilled that duty. There was nothing to indicate that any particular bags were the subject of either bill of lading. [CROMPTON, J.—The 467 bags are described in the bill of lading as of 35 tons 9 cwt., and he should have taken care to deliver bags of that weight.] The contract was not to deliver by weight but according to marks. [BLACKBURN, J.—Was it not the defendant's duty to inquire what particular bags were intended to apply to each bill of lading?] He was only bound to deliver the right number of bags with the right marks. He has expressly stipulated that he is not to be responsible for weight or measure. If he delivered 476 bags of 12 stone each, the weight would not exactly correspond with that stated in the bill of lading.

*525] *Archibald* (*Edward James* with him), for the plaintiff.—*This is not a question as to the duty of the master, but one of contract, and depends on the meaning of the bill of lading. The defendant was bound to deliver 467 bags weighing in the gross 35 tons, 9 cwt. He could only do that by delivering 467 bags of 12 stone each. Freight is payable upon the tonnage mentioned in the bill of lading. Though 467 bags of 12 stone each may not exactly correspond with the weight mentioned in the bill of lading, the defendant has undertaken to deliver them. If there is any difficulty, it arises from the negligence of the defendant in signing bills of lading without ascertaining the particular bags which were intended to apply to each. The stipulation that the defendant shall not be responsible for weight is merely for his protection in case of diminution of weight by evaporation or consumption by vermin.

Overend replied.

WIGHTMAN, J.—We are all of opinion that the judgment of the Court below ought to be affirmed. No doubt the captain of the ship acted very imprudently in signing bills of lading in this form, and the consignors are in some respects to blame; but the question is whether the captain ought to have delivered to the plaintiff 467 of the larger bags. In the bills of lading no particular bags are indicated by marks; and the only indication from weight is the words "467 bags rye meal bran, gross 35 tons, 9 cwt.," and they are to be delivered on payment of the freight of 15s. per ton. It appeared from the parol evidence, which was admissible to explain the bill of lading, that bags of two sizes were shipped on board, some of 12 stone each, and some of 8 stone each, and it is obvious that the master could only fulfil his contract by delivering to the plaintiff 467 bags of the larger *526] size. It may be that the weight of those bags was not exactly that mentioned in the bill of lading, but by the terms of it the captain was not responsible for weight, or measure. If the 467 bags did not exactly weigh what was stated, the plaintiff could not refuse them; but the weight is mentioned for the purpose of indicating what bags the master was bound to deliver and the plaintiff was bound to accept, viz., the larger bags.

Judgment affirmed.

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

LIMPUS v. LONDON GENERAL OMNIBUS COMPANY.

June 23.

The driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. In an action against the defendants, the driver of their omnibus said that he pulled across the plaintiff's omnibus to prevent it passing him. The defendants had given instructions to their driver not to obstruct any omnibus. The Judge directed the jury that a master was responsible for the reckless and improper conduct of his servant in the course of the service: that if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the interest of the defendants, then they were responsible: that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the act of the defendants' servant was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.—Held, in the Exchequer Chamber, that the direction was right: Wightman, J., dissentiente.

ERROR on a bill of exceptions.—The declaration stated that before and at the time of the committing of the grievances, &c., the plaintiff was lawfully possessed of an omnibus and harness, and of horses drawing the same, which were in a certain public highway. And the defendants were then possessed of another omnibus, and of horses drawing the same, which were then under the care, government, and direction of a servant of the defendants, who was then driving the same in and along the same highway. Nevertheless the defendants, by their said *servant, so carelessly, negligently, and improperly drove, governed, and directed their said omnibus and [*527 horses, that by and through the mere carelessness, negligence, and improper conduct of the defendant by their said servant in that behalf, the said horses and omnibus of the defendants ran against and came in collision with the horses and omnibus and harness of the plaintiff, and overturned and broke to pieces and damaged the said omnibus and harness of the plaintiff, and bruised, wounded, and injured one of the horses of the plaintiff. By means whereof the plaintiff was put to and necessarily incurred expense in and about endeavouring to cure his said horse and repairing the damage done to his said harness and omnibus, &c.

Plea.—Not guilty.—Issue thereon.

The cause was tried, before Martin, B., at the Middlesex Sittings after Michaelmas Term, 1861. The bill of exceptions set out the Judge's note of the evidence, which was (in substance) as follows:—

The driver of the plaintiff's omnibus stated that on the 27th August he left the Bank for Hounslow. After he had passed Sloane Street and was going towards Kensington, he stopped, about the barracks at Knightsbridge, to take up two passengers. The defendants'

omnibus then passed him, and got ahead, eighty to a hundred yards. In passing, the driver eased his pace, and witness went on at his regular pace and overtook him. There was room in the road for five or six omnibuses. When witness got up to the defendants' omnibus, it was on the off side of the road rather than the near; but there was plenty of room to pass. As witness was going to pass, the driver of the defendants' omnibus pulled across the road, and one of the hind wheels touched the shoulder of witness's near horse. Witness called out and tried to pull up, but could not. There was a bank there, and *528] the defendants' driver forced the *witness's off horse on to the bank. The wheels of plaintiff's omnibus went on the bank and threw the omnibus over. On cross-examination the witness stated that the defendants' driver pulled his horses towards the witnesses' horses to prevent him passing.

Another witness stated that the defendants' driver drove across the road purposely to prevent the progress of the plaintiff's omnibus, and that he considered it a reckless piece of driving.

On behalf of the defendants, the driver of their omnibus stated that he passed the plaintiff's omnibus, when the driver pulled up on his near side to take up the two passengers. Afterwards the plaintiff's driver put his horses into a gallop to overtake the defendant's omnibus. The witness proceeded to say:—"I pulled across him to keep him from passing me, to serve him as he had served me. His omnibus ran upon the bank and turned over on its side. I pulled across on purpose."

The witness stated that he was furnished with the following card:—

"London General Omnibus Company (Limited)."

"Attention is particularly directed to the following regulation of the Company, and the drivers are desired to act in accordance therewith.

"During the journey he must drive his horses at a steady pace, endeavouring as much as possible to work in conformity with the time list. He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business whether such omnibus be one belonging to the Company or otherwise.

"By Order.—A. G. CHURCH, Secretary,

"31, Moorgate St."

*529] Another witness, who was a passenger on the defendants' omnibus, stated that at Knightsbridge there was a contention between the conductors of the two omnibuses which should have three ladies, who got into the plaintiff's omnibus. The defendants' driver wished to go on; the plaintiff's drove him across the road, so that he could not go on. The defendants' driver said: "I will serve you out when I get on the road." The plaintiff's omnibus went on first, and stopped at the barracks to take up two passengers, when the defendants' omnibus passed it. When near Gore Lane, the defendants' driver maliciously and spitefully drove his horses suddenly to the footpath, not allowing the after omnibus any space at all."

Martin, B., directed the jury "that, when the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver being dissatisfied and irritated with the plain-

tiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant: that if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and the instructions given to the defendants' driver, and read in evidence to the jury, *were [530 immaterial if the defendants' driver did not pursue them; but that if the true character of the act of the defendants' servant was, that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible."

The defendants' counsel excepted to the said ruling, for that the said Baron misdirected the jury in telling and directing them as aforesaid; and, further, that, the learned Baron ought to have told the jury that, if they believed that the defendants' driver wilfully drove across the road as aforesaid, even for the purpose of merely obstructing the plaintiff's omnibus, the defendants were not responsible, and he ought to have told and directed the jury that for an act wilfully done by the servant of the defendants against the orders of his employers contained in the said paper or card, even though at the time of doing it he was in the course of driving for his employers, the defendants were not responsible: that the learned Baron ought to have told the jury that there was no evidence to justify them in finding that the driver of the defendants' omnibus, in doing the act complained of, was acting in the course of his employment; and he ought to have told them that there was no evidence to warrant him in finding for the plaintiff, and ought to have directed them to find their verdict for the defendants. The jury gave a verdict for the plaintiff, with 35*l.* damages.

Mellish (*Matthews* with him) now argued (a) for the plaintiffs in error (the defendants below).—The direction of the learned Judge was erroneous. There was evidence that the defendants' driver wilfully and recklessly drove across the plaintiff's omnibus for the purpose of impeding its progress. It is not contended that the fact of the *servant having committed a wilful trespass necessarily, of [531 itself, absolves the master from responsibility, but it is submitted that a master is not liable for a wilful trespass committed by his servant, unless it was done in obedience to the master's orders, or was within the scope of the servant's employment. Here the defendants' servant was employed to drive his omnibus, and if the wrongful act had been done in the course of that employment the defendants would be liable, but they are not if the act was done by the servant for some purpose of his own. The learned Judge made it an essential part of his

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

direction, whether the defendants' driver was doing that which he believed to be for the interest of his employer; whereas the real question was whether the driver thought the act necessary for carrying out his masters' orders. The true rule is laid down in *Croft v. Alison*, 4 B. & Ald. 590 (E. C. L. R. vol. 6): "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." [WILLIAMS, J.—If a driver in a moment of passion vindictively strikes a horse with a whip, that would not be an act done in the course of his employment; but in this case the servant was pursuing the purpose for which he was employed, viz., to drive the defendants' omnibus. Suppose a master told his coachman not to drive when he was drunk, but he nevertheless did so, would not the master be responsible?] Here the defendants' driver recklessly and purposely obstructed the plaintiff's omnibus. That was not an act *532] within the scope of his employment, and *was contrary to the orders given to him by his master. If the action had been against the servant, it must have been in trespass, not case. [BLACKBURN, J.—If the defendants' driver did the act to effect some purpose of his own, the case would fall within the latter part of the direction.] The doctrine laid down in *Croft v. Alison* was recognised and adopted in *Seymour v. Greenwood*, 7 H. & N. 355.† [CROMPTON, J.—Was not the driver carrying out his masters' purposes in attempting to get before the other omnibus and pick up passengers?] He states that he drove across the plaintiff's omnibus to prevent it from passing him, and to serve the plaintiff's driver as the plaintiff's driver had served him. [WIGHTMAN, J.—Would the master have been responsible if the servant had thought it for his master's interest to drive against the other omnibus and overturn it?] *Lyons v. Martin*, 8 A. & E. 512 (E. C. L. R. vol. 35), decided that a master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful and is not proved to have been authorized by the master. Here the servant wilfully did an act which he knew he had no right to do, and which he was instructed by his master not to do; and it can make no difference that he believed it to be for the benefit of his master, since it was not within the scope of his employment.

Lush, for the defendant in error (the plaintiff below).—The direction was right. The true test is whether the servant, in doing the particular act, ceased to be the agent of his master, and did it solely for his own purposes. If the defendants' driver had wilfully driven against the other omnibus and overturned it, the jury could not have found that he did it in the course of his employment or for the benefit, or supposed *benefit of his master. The object of the *533] defendants was to get as much traffic as they could on the road, and their driver, in doing the wrongful act, was attempting to carry out that object. [CROMPTON, J.—It was merely an act of wrongful driving.] Suppose the defendants had told their driver not to drive

faster than seven miles an hour, but he did so, would not the defendants be liable for damage resulting from it?] The defendants' driver drove across the other omnibus, not for any purpose of his own, but believing that it was for the interest of his masters to prevent that omnibus from passing him. [WILLIAMS, J.—Suppose the driver of an omnibus saw a passenger waiting at a distance, and, in order to reach him before another omnibus, drove at full speed and thereby ran over a person, would not the master be liable?] The fair meaning of the direction is, that, if the defendants' servant did the wrongful act in order to effect any purpose of his own, they are not liable, but, if the act was done in the course of the employment or for the benefit of the defendants, they are responsible. That is directly within the principle laid down in *Croft v. Alison*, 4 B. & Ald. 590 (E. C. L. R. vol. 6), and *Seymour v. Greenwood*, 7 H. & N. 355.† The argument on the part of the defendants would limit the responsibility of a master to acts which are strictly within the authority of the servant. But a servant has a discretion intrusted to him by his master, as to the pace and mode of driving. *Lyons v. Martin*, 8 A. & E. 512 (E. C. L. R. vol. 35), merely decided that a master is not liable in trespass for a wilfully unlawful act of his servant unauthorized by him.—He also referred to *Kyle v. Jeffres*, 3 Macq. 611.

Mellish replied.

Cur. adv. vult.

*The learned Judges having differed in opinion, the following judgments were now delivered. [*534]

WIGHTMAN, J.—It appears by the evidence in this case that the defendants were the proprietors of an omnibus plying between the Bank and Hounslow, which at the time in question was driven by a coachman in their service; that whilst upon the road, in the course of his employment to drive defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, wrongfully endeavoured to hinder and obstruct the passage along the road of another omnibus, belonging to the plaintiff; and for that purpose, he, who was ahead of the plaintiff's omnibus 80 or 100 yards, slackened his pace, until the plaintiff's omnibus came up to him and was about to pass, and he then purposely pulled across the road in order to prevent and obstruct his progress, and in so doing ran against one of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reason assigned by the defendants' coachman for this wrongful proceeding was that he pulled across the plaintiff's coachman to keep him from passing, in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman).

It seems clear upon the evidence that this was wholly a wilful and unjustifiable act on the part of the defendants' coachman, and not in the lawful prosecution of his masters' business.

A master is undoubtedly responsible for any damage occasioned by the negligence or carelessness of his servant whilst employed upon his master's business. In the present case it was no part of his employment to obstruct or hinder the passing of other omnibuses or carriages,—on the contrary he was directed not to do so.

The case appears to me to fall within the principle of the *decision in the case of *Croft v. Alison*, 4 B. & Ald. 590 (E. C. [*535]

L. R. vol. 6), cited upon the argument. In that case the Court said that the distinction was this:—"That if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horse of another person and thereby produces an accident, the master is not liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

In the case of *Lyons v. Martin*, 8 A. & E. 515 (E. C. L. R. vol. 35), Mr. Justice Patte-on, in his judgment, says, "*Brucker v. Fromont*, 6 T. R. 659, and other cases, where the master has been held liable for the consequences of a lawful act done negligently by his servant, do not apply. Here the act was utterly unlawful. A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one." There are other cases, some of which were cited upon the argument, to the same effect. In the present case the defendants' coachman wilfully did an illegal act contrary to his masters' orders, and quite beyond the scope of his employment. In this view of the case, it appears to me that, if the evidence of the defendants' coachman was believed, as well as that of the other witnesses in the case, the verdict ought to have been for the defendants. The question however before us is whether the direction of the learned Judge to the jury, as it appears upon the bill of exceptions, was right in point of law upon the case as it appeared in evidence. I entertain the highest and most sincere respect for the opinion of my brother Martin, but it does appear to me that the mode in which the questions were put to the jury was such as might mis-
*536] lead them, and *induce them to find a verdict which I cannot but think was wrong.

He appears to have told them "that if the act of the defendants' driver in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him *in the course of his service*, and to do that which he thought best to suit the interests of his employers and to interfere with the trade and business of the other omnibus, the defendants were responsible; and that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the coachman not to obstruct another omnibus or hinder or annoy the driver in his business were immaterial."

It certainly appears to me that the wilfully or wrongfully attempting to obstruct the progress of another omnibus contrary to the express directions of the defendants, though done by their coachman *whilst* employed in the service of the defendants, cannot be considered an act done by him *in the course of his service*. It was quite beside the course of his service and what he was employed to do; and I cannot consider the express prohibition to the coachman to do what he did as immaterial in considering what was the course of his service in that respect. This was not a case of reckless or careless driving, but of wilfully and wrongfully attempting to obstruct the passage of another omnibus, and in so doing running against one of the horses. This cannot, I think, under the circumstances, be considered as an act done

in the course of his service, even though the coachman might think that it was for his masters' interest by such wrongful means to obstruct the business of the other omnibus. The defendants' coachman was not employed to *obstruct or hinder the plaintiff's omnibus, [*537 nor was it in the course of his service, in the proper sense, to do so. Upon the evidence it was entirely his own wrongful and wilful act, for which I think, according to the distinction taken in the cases to which I have referred, the defendants are not responsible. The jury, upon the direction to which I have referred, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and that he thought it for their benefit to obstruct the other omnibus, the defendants would be liable. This I think was wrong for the reasons I have given; and I am therefore of opinion that there should be a trial de novo.

WILLIAMS, J., said.—I am of opinion that the judgment ought to be affirmed. If a master employs a servant to drive and manage a carriage, the master is responsible for any misconduct of the servant in driving and managing it which must be considered as having resulted from the performance of the duty intrusted to him, and especially if he was acting for his master's benefit, and not for any purpose of his own. I think that the summing up of my brother Martin was substantially in accordance with that doctrine, and therefore there is no foundation for the bill of exceptions.

CROMPTON, J., said.—I must confess that my mind has altered in the course of the discussion. At first I was inclined to the opinion which my brother Wightman has expressed, but my present impression is in favour of the view of my brother Williams, that the injury resulted from an act done in the course of the driving and management of the omnibus. I do not follow my brother Wightman in one respect (for which however he has the authority of *Patteson, [*538 J., in *Lyons v. Martin*, 8 A. & E. 515 (E. C. L. R. vol. 35),) as to its being necessary that the act done by the servant should be a lawful act, for later cases show that the act need not be lawful in order to fix the master with responsibility; but my doubt has been whether this was an act done within the scope of the driver's authority, in other words, whether he was acting in the course of the driving or management of the omnibus. It appears by the evidence of the driver that he was driving the defendants' omnibus in an improper way, for, without intending to touch the horses of the plaintiff's omnibus, he drove so near to it, for the purpose of keeping it from passing him, that he caused the accident. It is not necessary to say what would have been the case if the driver had used the omnibus so as to block up the road; as it is, I cannot see that the direction of my brother Martin was necessarily wrong. If the matter had come before us on a motion for a new trial, it may be that I should have agreed with my brother Wightman, for the question might have been presented in such a way as to bring it more clearly before the jury, and it is possible that some expressions of the learned Judge may have led them to a wrong conclusion. But the question now is, whether any of the exceptions show that the learned Judge was wrong in point of law. Throughout his summing up he left it to the jury to say whether the

injury resulted from an act done by the driver in the course of the service and for his masters' purposes. That is the true criterion; and I cannot see anything necessarily wrong in the ruling of my brother Martin. Therefore, though with considerable doubt, I do not think that we ought to reverse the judgment of the Court below.

WILLES, J., said.—I am of opinion that the judgment of the Court *539] below ought to be affirmed. The direction of *my brother Martin was in accordance with principle and sanctioned by authority. It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible/ for there ought to be a remedy against some person capable of paying damages to those injured by improper driving/. This was treated by my brother Martin as a case of improper driving, not a case where the servant did anything inconsistent with the discharge of his duty to his master, and out of the course of his employment. The defendants' omnibus was driven before the omnibus of the plaintiff, in order to obstruct it. It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment?

But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it: That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money, as he could for his master, and to do it in rivalry with other omnibuses on the road. *540] The act of driving as he did is not inconsistent with *his employment, when explained by his desire to get before the other omnibus. I do not speak without authority when I treat that as the proper test. Take the ordinary case of a master of a vessel, who it must be assumed is instructed not to do what is unlawful but what is lawful, if he has distinct instructions not to sell a cargo under any circumstances, but he does so under circumstances consistent with his duty to his master, the master is liable in damages to the person whose goods are sold.

It appears to me that the summing up is in accordance with the principle that a master is liable for acts done by his servant in the course of his employment. It is also consistent with authority. I need only refer to the authority of Lord Holt in *Tuberville v. Stainpe*, 1 Ld. Raym. 264, and of Lord Wensleydale in *Huzzey v. Field*, 2 C. M. & R. 482.† It is part of the history of the law that the judgment in *Huzzey v. Field*, although delivered by Lord Abinger, was pre-

pared by Lord Wensleydale. That learned person there laid down that the proper question is whether the servant was acting at the time in the course of his master's service, and for his master's benefit; if so, his act was that of his master, although no express command or privity of his master was proved. It seems to me that in so laying down the law he was strictly accurate; and I feel bound to say that it is for the interest of every person (for all are liable to be injured by servants), that he should not be without remedy by the law being loosely administered. I entertain no doubt that the direction was correct, and that the judgment ought to be affirmed.

BYLES, J., said.—I am also of opinion that the direction of my brother Martin was correct. He used the words "in the course of his service and employment," which, as my brother Willes has pointed out, are justified by the decisions. *The direction amounts to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant. [*541

It is said that what was done was contrary to the master's instructions; but that might be said in ninety nine out of a hundred cases in which actions are brought for reckless driving. It is also said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant. If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved. Looking at what is a reasonable direction, as well as at what has been already decided, I think this summing up perfectly correct.

BLACKBURN, J., said.—I am also of opinion that the direction of the learned Judge was sufficiently correct to afford the jury a guide, in the particular case, which is all that is required. It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. That the learned Judge told the jury, and perfectly accurately, but that alone would not be enough to guide them in coming to a correct conclusion. It was necessary that the jury should understand the principles which they must apply in order to ascertain whether the act was done in the course of the servant's employment. It is upon that part of the summing up that Mr. *Mellish* has mainly pointed his argument, saying that it gave the jury a wrong guide.

Now, we must look at what the particular employment *was in order to see what was understood by the jury. The defendants' servant was the driver of an omnibus, and as such it was his duty, not only to conduct it from one terminus to another, but to use it for the purpose of picking up traffic during the course of the journey. He drove across another omnibus, under circumstances from which the jury might have thought that it was done for the purpose of reeking his spite against the driver of that omnibus. The learned judge, having to tell the jury what was the test by which they were to determine whether the act was done in the course of the service or not, used language in which he tells them, perfectly rightly, that if the act was done in the course of the service the defendants were

responsible; and he goes on to say, "that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant." No doubt what Mr. *Mellish* said is correct: it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned Judge goes on to say that *543] "the instructions given to the defendants' servant were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion "that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible." That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his masters' interest or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible. That removes all objection, and meets the suggestion that the jury may have been misled by the previous part of the summing up.

Under these circumstances, I think that the direction given by the learned Judge was sufficiently accurate to guide the jury in coming to a right conclusion, and that there ought not to be a trial de novo.

Judgment affirmed.

*544] *IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

BAGNALL and Another v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. June 25.

The plaintiffs were owners and occupiers of a coal-mine which, as well as the surface land, formerly belonged to the same owner. A railway Company, to whose rights and obligations the defendants succeeded, purchased under the powers of their Act of Parliament, the surface-land for the purpose of their railway, and constructed it thereon. The Company cut and removed upwards of twenty feet in thickness of the surface soil over the plaintiffs' mine to get the level at which they laid their rails. This soil was clay impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the Company along the length of their line to a lower district of country, through which a brook flowed. The railway was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, but was an impediment to the passage of water in large floods.

The Company were required by their Act of Parliament to make and maintain sufficient drains. At the time the railway was made the plaintiffs' mine was not worked within forty yards of it; and drains were made at the side of the railway sufficient to carry off the water. Subsequently the plaintiffs gave the defendants notice of their intention to work the mine under the railway. The defendants having declined to purchase the mine the plaintiffs worked under it, when, from no fault or negligence of theirs, but as the natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendants threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. In the year 1860, a flood happened, and the water, part of which would have escaped but for the bridge, flowed down the railway, and in consequence of the high ground between the brook and the surface over the mine being removed it reached that spot, and, together with the water falling there and the springs arising in the cutting, penetrated into the mine for want of efficient drains.—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendants were liable in an action for the damage sustained by the plaintiffs, and that the claim was not one which could have been enforced under the compensation clauses of the Railway Clauses Consolidation Act, 1845.

THIS was a proceeding in error on the judgment of the Court of Exchequer for the plaintiffs, on a special case stated for the opinion of that Court. The pleadings and facts sufficiently appear in the report of the case in the Court below (7 H. & N. 423†).

Phipson argued for the plaintiffs in error (a) (the defendants below) in last Easter Vacation (May 20), and *Gray* argued for the defendants in error (the plaintiffs below). The arguments were in substance the same as those in the Court below. The following additional *authorities were cited: *Regina v. The Eastern Counties Railway Company*, 10 A. & E. 531 (E. C. L. R. vol. 37); *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 71); *Caledonian Railway Company v. Lockhart*, 3 Macq. 808; *In re Penny and The South-Eastern Railway Company*, 7 E. & B. 660 (E. C. L. R. vol. 30); *In re Ware and The Regents Canal Company*, 9 Exch. 395;† *Brine v. The Great Western Railway Company*, 2 B. & S. 402 (E. C. L. R. vol. 101); *Smith v. Kenrick*, 7 C. B. 515 (E. C. L. R. vol. 62); *Rex v. The Commissioners of Sewers for Pagham*, 8 B. & C. 355 (E. C. L. R. vol. 15). *Cur. adv. vult.*

The judgment of the Court was now delivered by

WILLES, J.—In this case the conjoint effect of the making of the defendants' cutting, and of their neglect to keep their drains in proper order has been, that large quantities of water, which, but for the cutting, would not have come near the plaintiffs' mine, and but for the defective state of the drains would have passed away and been carried off without injury to the mine, poured down into and damaged the mine, for which damage the present action is brought.

The Company had, upon receiving the statutory notice, declined to purchase.

The jury found (and upon this finding the question arises) the principal cause of the mischief to be that the drains had not been kept in proper order.

It was hardly denied, and could not successfully have been disputed, that the Company was liable to make compensation, and the main stress of the argument bore upon the question whether such compensation can be recovered as damages in this action, or whether the plaintiff ought to have proceeded under the compensation clauses of the Railway Act.

(a) Before Erle, C. J., Crompton, J., Willes, J., Keating, J., and Mellor, J.

*546] Now the obvious intention of the Legislature in giving *the Company the option of purchasing the mine was that, in case they should decline to buy, the mine-owner should possess his property intact. If it were otherwise, the railway Company would have it in their power to do indirectly what they are not permitted to do directly, namely, to take away the benefit of the mine, either in the whole or in part, without paying for, and after they had elected not to buy, it.

And there are practical obstacles of an insuperable character against saying that there arises upon the making of the railway an immediate right to compensation in respect of possible future injury to unopened mines. At that time it does not appear that the mine will ever be worked, nor that the drains will not always be kept in proper order, so that the Company might contend that peradventure no damage would ever arise, and an assessment of damages in advance would be sheer speculation. This consideration distinguishes the present case from that of *The Caledonian Railway Company v. Lockhart, & Macqueen* 808, where the embankment could not have been made without exposing the land to damage by periodical floods, which were certain to occur, and the deterioration in value by disability to work might at once be calculated with reasonable certainty, and brings it within the authority of that class of cases in which it is held that damage caused by a negligent and improper exercise of the powers of the Act forms the proper subject of an action. A fortiori, this is so where the negligence is in the care and management of the line, not in the construction of the works.

That was the course of reasoning by which the Court of Exchequer arrived at the conclusion that the defendants were liable in an action, and upon consideration we are satisfied that their judgment was correct. It must therefore be affirmed.

Judgment affirmed.

*547] ***IN THE EXCHEQUER CHAMBER.**

(Error from the Court of Exchequer.)

DARLOW v. EDWARDS, SNOW and SARAH his Wife. June 24.

A testator charged his real estate with payment of an annuity to a servant, hired at yearly wages, provided she should be in his service at the time of his decease. Two days before his death the testator wrongfully dismissed her without notice, and she left his house.—Held, that she was not entitled to the annuity.

ERROR on a bill of exceptions.—The declaration was in replevin of the plaintiff's goods taken in his dwelling-house.

Cognisance and Avowry.—The defendant Edwards, as bailiff of Snow and Sarah his wife, well acknowledges, and Snow and Sarah his wife in their own right well avow, the taking of the said goods because one Thomas Darlow at the time of his death was seised in fee of the said dwelling-house, and by his will "charged and made

chargeable the said dwelling-house in which, &c., to and with the payment to the defendant, Sarah (then Sarah Bowring, who was then in the service of the said Thomas Darlow), of an annuity or clear yearly sum of 12*l.*, provided she should be in the service of the said Thomas Darlow, now deceased, at the time of his decease, for and during the term of her natural life, by equal half-yearly payments, &c., with such and the like remedies, in case of default in payment, by distress and sale, or otherwise, as landlords could or might exercise upon common demises;" and the said Thomas Darlow by his will gave, devised, and bequeathed the same annuity to the defendant Sarah.—Averments: that, on the 25th September, 1856, the testator died so seised of the dwelling-house in which, &c., without having altered or revoked his will: that the defendant continued in the service of the testator until and at the time of his decease, whereupon the defendant *Sarah became and was seised as of freehold of [548 the said annuity during her life: that she afterwards married the defendant Snow; and because nine of the half-yearly payments were due and in arrear, the defendant Edwards as bailiff acknowledges, and the defendant Snow and Sarah his wife in their own right avow, the taking of the said goods as a distress for the said arrears of the said annuity.

Plea in bar.—That the defendant, Sarah, was not in the service of the said Thomas Darlow at the time of his decease.—Issue thereon.

The cause was tried before Martin, B., at the Huntingdon Spring Assizes, 1862, and the bill of exceptions stated the following facts:—

1. Thomas Darlow, the father of the plaintiff (hereinafter called the testator), died on the 25th of September, 1856, seised in fee of the said dwelling-house in which, &c. The defendant Sarah for several years before, up to, and on the 22d of September, 1856, was in the service of the testator as a domestic servant, under a yearly hiring at 10*l.* 10*s.* wages, and the current year of which yearly hiring did not expire until the 11th day of October, 1856. The testator by his will, duly made and attested, &c., devised to the plaintiff, his heirs and assigns, the said house in which, &c., along with other property, subject to a charge in favour of the defendant Sarah (by her then name of Sarah Bowring), in the words following:—"Subject nevertheless, and I do hereby charge and make chargeable the said several messuages, lands, tenements, and hereditaments hereinbefore devised to my son Thomas Darlow to and with the payment to my faithful servant, Sarah Bowring, of an annuity or clear yearly sum of 12*l.*, provided she shall be in my service at the time of my decease, for and during the term of her natural life, by equal half-yearly payments, the first payment to be made at the expiration of six calendar months *next after [549 my decease, with such and the like remedies, in case of default in payment, by distress and sale, or otherwise, as landlords can or may exercise upon common demises. And I bequeath the same annuity to the said Sarah Bowring accordingly."

2. On the said 22d of September the plaintiff, who resided with his said father, called the said Sarah down stairs from the upper part of the house into a room in the lower part of the same, and told her to take up some money which then was upon a table there. The said Sarah asked what it was for. The plaintiff answered, it was her

wages, and that if she did not take it and go he would make her; that she could not agree with Mrs. Mawdesley, the sister of the plaintiff and daughter of the testator. The said Sarah said the plaintiff was not her master, and she would not go that way; she would see master. The plaintiff said she should not, and became very angry; whereupon she took up the money and went away. The said Sarah went again the next morning and asked the plaintiff to let her see the testator, but the plaintiff refused. The said Sarah, in fact, had said of the said Mrs. Mawdesley and the plaintiff, to a fellow-servant, that they were burying the old man before he was dead. For the last two years of the testator's life he had been in failing health, and required much care and attention, which she gave him, and for which he expressed himself grateful; and that in her opinion he was seized with mortal illness on the 21st day of September aforesaid. The defendant, Sarah, after the death of the testator, and before the said time when, &c., married the defendant Matthew Snow.

8. The plaintiff gave in evidence that on the 22d of September the testator was informed by his daughter, the said Mrs. Mawdesley, that the defendant, Sarah, had used disrespectful language to her fellow-servant with reference *to the said Mrs. Mawdesley, and that *550] thereupon the testator sent a message for the plaintiff to go to him in order that he might direct the plaintiff to dismiss the said Sarah. The plaintiff upon receiving the message went to the testator, and was by him directed to pay the defendant, Sarah, her wages, and send her away, as he, the testator, would not put up with her temper any longer. The plaintiff did thereupon forthwith pay the said Sarah her wages and sent her away. She did then and there go away accordingly. The testator was informed that she had been so sent away and had gone, and expressed his satisfaction thereat. The testator was in full possession of his faculties at the time. The defendant, Sarah, had in fact used disrespectful language to the said fellow-servant with reference to the said Mrs. Mawdesley. The said Sarah, after she had in fact left the house of the testator, told a friend that she had left her situation, and, on being asked by the said friend what for, answered, "because of a little unpleasantness between her and Mrs. Mawdesley."

The learned Judge directed the jury that there were three questions for their consideration. First, whether the defendant, Sarah, had voluntarily left the service. Secondly, whether she had consented to rescind the contract of service. Thirdly, whether she had been guilty of misconduct to justify dismissal; and that unless the said Sarah had voluntarily left the service of the testator, or the contract of service had been rescinded by the mutual consent of the testator and the said Sarah, or she had done something to justify her dismissal by the testator, they ought to find a verdict for the defendant.

Whereupon the plaintiff's counsel requested the learned Judge to inform the jury that the question for them was, whether the defendant, Sarah, was in fact dismissed by or by the authority of the testator; and that, if so, she ceased to be in his service within the meaning of *551] the said will and *was not entitled to the said annuity. But the learned Judge refused so to inform the jury, and left the

aforesaid three questions to them. And thereupon the jury gave a verdict for the defendants.

O'Malley (*Keene* with him) argued(a) for the plaintiff.—The question is whether the defendant, Sarah, was in the service of the testator at the time of his death. It is clear that she was not *in fact* in his service; but the learned Judge ruled that, unless the contract was determined, she was constructively in his service. But the law of constructive service no longer exists. It was formerly considered that where a servant, hired by the quarter, was discharged by his master without sufficient cause in the middle of a quarter, he might recover the quarter's wages under the indebitatus counts for work and labour: *Gandell v. Pontigny*, 4 Camp. 375; but that doctrine is now overruled, and it is established that a servant wrongfully dismissed cannot recover, under the indebitatus counts, as for a constructive service: *Archard v. Hornor*, 3 C. & P. 349 (E. C. L. R. vol. 14); *Smith v. Hayward*, 7 A. & E. 544 (E. C. L. R. vol. 34); *Fewings v. Tisdale*, 1 Exch. 295;† *Goodman v. Pocock*, 15 Q. B. 576 (E. C. L. R. vol. 69). The servant might have recovered damages under a special count for the wrongful dismissal: *Elderton v. Emmens*, 6 C. B. 160 (E. C. L. R. vol. 60). [CROMPTON, J.—It is difficult to see how the service continues when the complaint in such an action is that it was wrongfully put an end to.]

The court then called on

Metcalfe, for the defendants.—The defendant, Sarah, was in the service of the testator at the time of his decease, so *as to entitle her to the annuity under the proviso in his will. [CROMPTON, J.—It may be conceded that she was wrongfully dismissed by the testator.] The wrongful dismissal did not rescind the contract of service. [BLACKBURN, J.—If a person contracts not to revoke the authority of an arbitrator, though by so doing he commits a breach of contract, the revocation is valid; is it not the same in the case of a wrongful dismissal of a servant?] By the 8 & 9 Wm. 3, c. 30, s. 4, it is declared that no person shall acquire a settlement by hiring, "unless such person shall continue and abide in the same service during the space of one whole year;" and it has been held that a wrongful dismissal does not put an end to the contract, so as to prevent the servant gaining a settlement, but is merely a dispensing with the service for the remainder of the term: *Rex v. St. Phillip's Birmingham*, 2 T. R. 624. [CROMPTON, J.—In that case the mistress paid the servant his whole wages, so that there was no wrongful dismissal, but merely a dispensing with the service for the remainder of the term.] *Rex v. Hardhorn with Newton*, 12 East 51, is also an authority that a wrongful dismissal does not put an end to the contract of service. There the Court point out the distinction between that case and *Rex v. Grantham*, 3 T. R. 754, where the dissolution of the contract was assented to by both parties. [BLACKBURN, J.—The 4th section of the 8 & 9 Wm. 3, c. 30, comes by way of proviso. There must be a hiring for a year; then, as a condition of acquiring a settlement, the statute says that the person so hired "shall continue and abide in the same service during the space of one whole year." That being a condition imposed by statute, if the servant has done all

(a) Before Wightman, J., Williams, J., Crompton, J., Byles, J., and Blackburn, J.

he possibly can to fulfil it, that is enough: *Com. Dig. Condition* (D. 1).] The same reasoning would apply to a condition imposed by will. *553] *Goodman v. Pocock*, 15 Q. B. 576 (E. C. L. R. vol. 69), shows that the contract exists notwithstanding a wrongful dismissal, unless the servant has elected to treat it as rescinded. [BLACKBURN, J.—The contract may continue, so as to enable the servant to bring an action for the breach of it, but the service does not continue. WIGHTMAN, J.—If the servant brought an action for the wrongful dismissal, the declaration would contain an averment that she was ready and willing to serve, but that the master would not let her.] The words “provided she shall be in my service” do not mean “provided she shall actually do the work of a servant,” and they are satisfied by a dispensation of service. [CROMPTON, J.—Suppose she had been a servant in husbandry, could she have been punished under the statutes relating to such servants for disobedience of an order of her master given after her dismissal? Or suppose she had come back to the house and stolen something, could she have been indicted for larceny as a servant? Or, in the case of a male servant wrongfully dismissed, would the master afterwards be liable to pay a tax for him?] *Cuckson v. Stones*, 1 E. & E. 248 (E. C. L. R. vol. 102), is an authority that the contract may continue, although no service is in fact performed.

D. D. Keane, in reply, referred to *Herbert v. Reid*, 16 Ves. 481.

WIGHTMAN, J.—The question turns upon the intention of the testator, as shown by the words used in his will. He devised his real estate to his son in fee, subject to a charge in favour of the defendant in the following terms:—“Subject nevertheless, and I do hereby charge and make chargeable the said several messuages, lands, &c., to and with the payment to my faithful servant, Sarah Bowring, of an annuity or clear yearly sum of 12*l.*, *provided she shall be in my service* *554] **at the time of my decease.*” Therefore she is clearly not entitled to the legacy unless she was in the testator’s service at the time of his decease.

It is said that this is a case of considerable hardship, for the testator, two days before his death, discharged her, as it must now be taken, wrongfully; but at that time her wages, which were yearly wages, were not due, and therefore she was constructively in his service at the time of his death. But it seems to us that the service contemplated by the testator was not a constructive, but an actual service. No doubt the contract for service may remain although it was broken; and the servant might have recovered damages for the breach of it, but she was not in the service of the testator at the time of his death, and, not being so, she was not entitled to his bequest, and there ought to be a trial de novo. Trial de novo.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

WOOLLEN v. WRIGHT. June 23.

An execution-creditor does not, by becoming a party to an interpleader issue, ratify or adopt the act of the sheriff, so as to render himself liable in trespass for the seizure of the goods, which are the subject of the interpleader issue.

ERROR on a bill of exceptions.—The declaration stated that the defendant broke and entered a dwelling-house of the plaintiff, and seized, took, and carried away his goods.

Pleas (inter alia).—First: not guilty. Fourthly, as to breaking and entering the dwelling-house, a justification under a writ of fieri facias issued on a judgment recovered by the defendant against one Inman.

The plaintiff joined issue on the first plea, and took and joined issue on the fourth, except as to the judgment and *writ of fieri facias; and he also now assigned, that he sued for trespasses [*555 committed by the defendant to a greater extent, and with more violence, and for a longer time than was necessary for the purpose and on the occasion referred to in the fourth plea.

Plea to new assignment: not guilty.—Issue thereon.

The cause was tried before Martin, B., at the Yorkshire Summer Assizes, 1861, and the bill of exceptions stated the following facts:—At the time of the seizure hereinafter mentioned the plaintiff was the proprietor and in legal possession of Cooper's Hotel, at Brightside Lane, in Sheffield (being the dwelling-house mentioned in the declaration), and was then carrying on the said Cooper's Hotel as a public-house by and under the management of one George Inman and his wife, who were at the time residing therein. There were at the said Cooper's Hotel goods, fixtures, and effects of the plaintiff of large value, and also some goods of the said G. Inman. On the 17th September, 1860, the defendant obtained in the Court of Exchequer final judgment against the said G. Inman for the sum of 165*l.* 8*s.* 6*d.*, and the following day, by the direction of the defendant, his attorney sued out a writ of fieri facias, and delivered the same to the sheriff of York to be executed. On the same day a warrant was issued upon the writ by the sheriff directed to one of his officers, and endorsed to levy the amount of the judgment and costs of execution.

On the 19th September, 1860, the officer of the sheriff, with two of his men, entered the said Cooper's Hotel for the purpose of executing the said warrant upon the goods, chattels, and effects of the said G. Inman therein, and left one of his men in possession. There was evidence that the officer and men acting under his authority had misconducted themselves in levying and selling under the writ.

On the 20th September the plaintiff's attorney made a *claim to the goods, chattels, and effects so seized, on behalf [*556 of the plaintiff and served a notice of such claim on the officer of the

sheriff and the defendant's attorney. The sheriff thereupon took out an interpleader summons.

On the 5th October, the sheriff, the plaintiff, and the defendant, by their respective attorneys, appeared at the hearing of the said summons, when Wilde, B., ordered (*inter alia*) "that upon payment of 170*l.* into Court by the claimant within a week, and upon payment to the sheriff of the possession money, the sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of *fi. fa.*; and that, unless such payment should be made, the sheriff do proceed to sell the said goods and chattels, and pay the proceeds of such sale, after deducting the expenses thereof and the possession money, into Court to abide further order. The sheriff to permit the claimant to inspect the goods and chattels seized, and claimant, within a week, to give notice to the sheriff specifying which of such goods and chattels are not claimed by him. That the parties do proceed to the trial of an issue in which the said claimant shall be plaintiff, and the said execution-creditor shall be defendant; and that the question to be tried shall be whether at the time of seizure by the sheriff the goods, &c., were the property of the claimant as against the execution-creditor. The issue to be confined to the goods and chattels not specified in such notice as aforesaid."

On the 10th October, 1860, the plaintiff gave notice to the sheriff, specifying therein which of such goods and chattels were not claimed by him.

In pursuance of the interpleader order, the parties did proceed to the trial of an issue as to the title of the plaintiff to the goods and chattels seized exclusive of those specified in the said notice, and such issue was found for the plaintiff.

*557] The plaintiff not having brought into Court the sum *mentioned in the interpleader order, the goods were sold and the proceeds paid into Court; and on the determination of the interpleader issue, the said proceeds were paid over to the plaintiff.

The learned Judge told the jury "that there was evidence to go to them against the defendant upon the issues on the plea of not guilty and the new assignment. That the defendant was not responsible for the acts of the sheriff, or his officers, unless something more occurred than putting the writ into the sheriff's hands; but his coming forward in the interpleader proceedings, and accepting and acting upon the interpleader issue, was evidence for the jury that he adopted the seizure by the sheriff of the goods which were the subject-matter of the interpleader issue, and thereby made himself liable in respect of those goods; for that when an execution-creditor comes forward and claims the goods in an interpleader proceeding such as that given in evidence he thereby adopts the seizure of the sheriff and becomes a party to that issue, the seizure being for his benefit."

The counsel for the defendant excepted to the said direction, and contended that it was erroneous in point of law; and that there was no evidence to go to the jury as against the defendant in support of the issue on the plea of not guilty, or on the issue on the new assignment. And further, that the defendant making himself and becoming a party to the interpleader proceedings did not make him liable for the act of the sheriff in seizing the goods, nor was it any evidence to

go to the jury of his liability in this action. The jury found a verdict for the plaintiff on all the issues except that on the fourth plea, with 200*l.* damages.

Quain now argued (a) for the plaintiff in error (the *defendant below).—The direction of the learned Judge was erroneous. [*558 *Wilson v. Tumman*, 6 M. & G. 286 (E. C. L. R. vol. 46), is an express authority that an execution-creditor does not, by a subsequent ratification of the act of the sheriff, render himself liable as a wrongdoer. The sheriff did not act under the direction of the present defendant, but in obedience to the order of the Court.

The Court then called on

Kemplay, for the defendant in error (the plaintiff below).—The ruling of the learned Judge was correct. *Wilson v. Tumman* cannot be supported, or at all events is distinguishable. It is conceded that, where a person commits a trespass in his own name and on his own account, another cannot ratify the act so as to render himself liable for it. Thus a person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use: *Wilson v. Barker*, 4 B. & Ad. 614 (E. C. L. R. vol. 24). But where a person assumes to act for another, though without any previous authority, if the latter adopt the act, that is equivalent to a prior command, and renders him liable for the consequences. Liability by ratification depends on whether the act was done for the use or benefit of the person who ratifies it: *Eastern Counties Railway Company v. Broom*, 6 Exch. 314.† [WILLIAMS, J.—In that case the person who committed the trespass professed to act as the servant of the Company.] In Com. Dig. *Trespass* (C. 1), it is said that “trespass lies against him who afterwards assents to a trespass done for his use and benefit, though not privy at the time of it: *4 Inst. 317.” The law is [*559 stated in similar terms in Bac. Abridg. *Trespass* (G. 1). It is true that the sheriff is not the agent of the execution-creditor, but he acts under his direction and for his benefit. If the execution-debtor brought an action of trespass against the execution-creditor, the latter must justify by pleading that he recovered a judgment and issued thereon a writ by which *he directed* the sheriff to levy. [WILLIAMS, J.—If we were to hold that the execution-creditor was liable in trespass as agent of the sheriff, he would be liable for the whole amount levied including the sheriff’s poundage, which he has never touched.] In *Kelcey v. Minter*, 1 Bing. N. C. 721 (E. C. L. R. vol. 27), it was held that an execution-creditor was liable for the act of the sheriff in selling the goods of an insolvent after his imprisonment. *Tindal*, C. J., there said, that “on general principles, where a thing is done through the procurement of another, the procurer is as much liable as the agent. The sheriff and his employer sail in the same boat.” A sheriff is bound to obey the directions of the execution-creditor, and if he proceeds with an execution after it is countermanded, he is liable in trespass: *Barker v. St. Quintin*, 12 M. & W. 441.† There Lord Abinger, C. B., said:—“It is true that the sheriff is an officer of the Court, but the Court appoints him to do the plaintiff a service,

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

and will not put him in motion unless at the instance of the plaintiff." In *Walker v. Hunter*, 2 C. B. 324 (E. C. L. R. vol. 52), the execution-creditor, finding a claim made to the goods seized under the writ, directed the sheriff to withdraw, but he nevertheless remained in possession, and it was held that his act was one which the execution-creditor might ratify, it having been done for his benefit. Where a writ of execution is set aside as void, both the execution-creditor and his attorney are liable in trespass, for whoever *procures, commands, aids, or assists in a trespass becomes a trespasser: *Parsons v. Loyd*, 3 Wils. 341; *Barker v. Braham*, 3 Wils. 363. A party who ratifies a wrongful act done in his name and for his benefit becomes as it were a trespasser by estoppel: *Bird v. Brown*, 4 Exch. 786; *Buron v. Denman*, 2 Exch. 167.† There is no doubt that if an execution-creditor accompanies the officer in levying the execution, or indemnifies the sheriff, he makes the act of the sheriff his own: *Menham v. Edmonson*, 1 Bos. & P. 369; and it seems that the law is the same if the execution-creditor receives the money levied: *Rush v. Baker*, 2 Stra. 995. [WILLIAMS, J., referred to *Whitmore v. Greene*, 13 M. & W. 104.† BYLES, J.—According to your argument, in every case of interpleader in which the claimant succeeded, the execution-creditor would be liable to an action.] In *Wilson v. Tumman*, the question did not arise under the Interpleader Act; and all that the defendant did was, when served with notice of action, to say that he considered he had a just claim to the goods.

WIGHTMAN, J.—The question is whether the defendant is liable, as a wrongdoer, for the act of the sheriff in taking the plaintiff's goods. It appears by the evidence that the defendant, having recovered a judgment against one Inman, issued a writ of fieri facias which was placed in the hands of the sheriff. Under colour of that writ the sheriff seized the goods of the present plaintiff. The defendant did not interfere in any way with the execution, but merely caused the process to issue. The plaintiff claimed the goods, and an interpleader order was the result. Upon the interpleader summons being heard before a Judge, the defendant appeared *as execution-creditor, and became a party to an issue. It is said that was such a ratification of the act of the sheriff as to make it the act of the defendant and render the sheriff his agent. *Wilson v. Tumman*, 6 M. & G. 236 (E. C. L. R. vol. 46), (which has not been disputed until the present case), is an authority that what the defendant did was not a ratification of the act of the sheriff. The Court there said:—"If the defendant Tumman had directed the sheriff to take the goods of the present plaintiff, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But where the sheriff acting under a valid writ, by the command of the Court and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the

original taking, and make it a wrongful taking by the plaintiff in the original action." In *Whitmore v. Greene*, 13 M. & W. 104,† the goods of a debtor were seized by the sheriff under a writ of *fi. fa.*, and sold after the execution-creditor had notice of a prior act of bankruptcy, and it was held that he was not liable in trover. The Court there said:—"In the cases cited at the bar, of *Menham v. Edmonson*, 1 Bos. & P. 369, and *Rush v. Baker*, Buller's N. P. 41, the ground upon which it was held that the assignees could sue the execution-creditor was, in the last case, that the defendant had given a bond; and in the former that he was present at the *execution. But in the present case there has been no interference of any sort [*562 by the execution-creditor; and therefore, though he may be liable to refund the money paid to him, we think he cannot be sued in trover as a wrongdoer." In this case, if the sheriff had sold the goods under colour of the writ, not under the interpleader order, and the proceeds had been paid over to the defendant, probably he might have been liable to return the money; but upon the principle laid down in *Wilson v. Tumman*, and not contradicted, but rather supported by *Whitmore v. Greene*, the defendant cannot be sued as a wrongdoer for an act of the sheriff which he never authorized. As the case of *Wilson v. Tumman* is a direct authority that a subsequent ratification cannot render the defendant liable, there must be a trial *de novo*.

Trial *de novo*.

MEMORANDUM.

IN this Vacation, John Robert Kenyon, Esq., of Lincoln's Inn, Thomas Southgate, Esq., of Lincoln's Inn, and Arthur Hobhouse, Esq., of Lincoln's Inn, were appointed Her Majesty's Counsel.

Erchequer Reports.

MICHAELMAS TERM, 26 VICT. 1862.

THE ATTORNEY-GENERAL *v.* WYNDHAM. Nov. 20.

A testator died in 1811 having devised lands to his nieces as tenants in common in fee, with a proviso, that if his nephew should transfer 10,000*l.* consols into the names of trustees for the benefit of the nieces the lands should enure to the use of his nephew. The nephew having, in the following year, exercised his option and transferred the consols:—Held, that the defendant, the executor of the last surviving trustee, was liable to pay duty on the 10,000*l.* consols, at the rate of 2½ per cent. as fixed by 48 Geo. 3, c. 149.

INFORMATION in equity by the Attorney-General as follows:—

1. The object of this information is to obtain from the defendant, who is the legal personal representative of his late father, the Reverend John Heathcote Wyndham, deceased, payment of the duty owing to Her Majesty in respect of the legacy of 10,000*l.* Consolidated Bank Annuities, hereinafter mentioned.

2. Under the Act of Parliament, 45 Geo. 3, c. 28, a duty is payable to the use of Her Majesty upon all legacies, specific or pecuniary, or of any other description, above the amount or value of 20*l.*, whether the same be charged upon or payable out of real or personal estate.

3. By section 4 of the same Act, a legacy is defined to be a “gift by any will or testamentary instrument of any person dying after the passing of this Act, which by virtue of any such will or testamentary instrument shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person *564] may have the *power to dispose of, whether the same shall be given by way of annuity or in any other form.”

4. By section 5 of the same Act it is provided in effect, that the duties on legacies charged upon or payable out of real estate, or out of moneys to arise by the sale of real estate, shall be accounted for, answered, and paid by the trustee to whom the real estate shall be devised, or if there shall be no trustee, then by the person entitled to such real estate, subject to such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy.

5. By the Act of Parliament, 48 Geo. 3, c. 149 (which, although the duties granted by it were repealed in 1815 by 55 Geo. 3, c. 184, is still in force with regard to arrears of duty which became payable between 10th October, 1808, and 31st August 1815), the rate of duty payable upon any legacy of the amount or value of 20*l.* or upwards, given by the will of any person dying after the 5th April, 1805, either out of his personal estate, or out of or charged upon his real estate, or out of any moneys to arise from the sale, mortgage, or other disposition of his real estate, and which should be satisfied or discharged after the 10th October, 1808, to or for the benefit of a brother or sister, or any descendant of a brother or sister, of the deceased, was fixed at 2*l.* 10*s.* per cent.

6. Under the provisions of certain statutes in that behalf, the collection and the management of the duty on legacies has become and is now vested in the Commissioners of Inland Revenue.

7. The Rev. Thomas Heathcote, formerly rector of Stone, in the county of Kent (hereinafter referred to as the testator), died in the year 1811, having made a will, dated the 22d of July, 1809, which was duly executed and attested as was then by law required for the devise of real estate, and thereby, after giving various pecuniary legacies, *including one to his nephew, the said John Heathcote [*565 Wyndham, the testator gave all his freehold and copyhold lands, tenements, and hereditaments unto his three nieces, Henrietta, Charlotte, and Sophia Frances Wyndham, to hold the same (subject as to parts thereof to the life estate of the Countess of St. Vincent therein) unto his said nieces as tenants in common, and their respective heirs and assigns for ever, subject to a proviso that if any of them should marry, her interest should, from the day next before the day of her marriage, be suspended, and the rents of the said estates should thenceforth be enjoyed by such of them only as should not have been married until their respective marriage or death, to the intent that the whole rents should be enjoyed by such of them as should not marry until marriage or death, which should first happen; and that after all of them should be married, or the death of the survivor of them, which should first happen, the said freehold and copyhold estates should be held by his said three nieces, and their respective heirs and assigns, under the devise to them as tenants in common in fee simple, before contained: and the said will then contains a proviso in the following terms: "Provided, nevertheless, and I do hereby further declare and direct, that my said nephew, John Heathcote Wyndham, shall have the option of becoming the purchaser or beneficial proprietor or owner of the whole of my said freehold and copyhold estates, and the inheritance in fee simple thereof respectively, at the rate or price of 10,000*l.* 3*l.* per cent. Consolidated Annuities, transferrable at the Bank of England; and therefore that upon my said nephew, John Heathcote Wyndham, investing the sum of 10,000*l.* of those annuities in the names of himself and of any other person or persons to be appointed in that behalf by my said nieces, or any two of them, or by the survivor of them, or in default of appointment by them or her, in *the names of himself and of any one or [*566 two other person or persons of his own appointment, then and from thenceforth the use hereinbefore limited to my said nieces, their

heirs and assigns, in the said freehold manors, lands, hereditaments, and premises, and also in the said copyhold messuages, lands, hereditaments, and premises, shall absolutely cease and determine; and the same freehold manors, lands, hereditaments, and premises, and also the said copyhold messuages, lands, hereditaments, and premises, shall forthwith be and enure to the only absolute use of my said nephew, the said John Heathcote Wyndham, his heirs and assigns for ever, freed and discharged of and from all charges and encumbrances to be made or created by my said nieces, any or either of them, or any or either of their heirs and assigns; and also then and from thenceforth they, my said nieces, their heirs and assigns, shall on request, and at the costs and charges of my said nephew, John Heathcote Wyndham, his heirs and assigns, well and effectually convey all and singular my said freehold manors, lands, hereditaments, and premises, and surrender all and singular my said copyhold hereditaments and premises to the use of my said nephew, his heirs and assigns, or to the use of such person or persons, or for such estate or estates, as my said nephew, his heirs and assigns, shall direct, and the tenure of the said copyhold premises, and the rules of law and equity, will admit, freed and discharged from all charges and encumbrances to be done and committed by my said nieces, any or either of them, their heirs and assigns, in the mean time. And I declare that my said nephew, John Heathcote Wyndham, and such other person or persons, and their executors and administrators, shall thenceforth stand possessed of the said 10,000*l.* 3*l.* per cent. Consolidated Annuities, in trust for my said three nieces, in equal shares, and for their respective *567] executors, administrators, and *assigns, but that during their lives, and the life of the survivor of them, the said trustees shall pay the whole of the annual dividends and proceeds thereof to such of my said nieces only as shall have remained and be unmarried, in the same manner as is hereinbefore directed with regard to the rents and annual profits of my said freehold and copyhold estates; and after the marriage of all of them, or the death of the survivor of them, which shall first happen, that the said trustees shall transfer the principal of the said 10,000*l.* 3*l.* per cent. Consolidated Annuities to my said nieces and their respective executors, administrators, and assigns, in three equal shares." And the testator directed that in case he died before Lady St. Vincent, and his said nephew, John Heathcote Wyndham, chose to invest the 10,000*l.* consols before the death of Lady St. Vincent, then the said John Heathcote Wyndham was to retain the annual dividends of the said 10,000*l.* consols during Lady St. Vincent's life for his own use.

8. The testator left his said nephew, John Heathcote Wyndham, and his said three nieces in his will named respectively surviving him, and some time in the year 1812 his said nephew exercised the option given to him by the testator's will of purchasing his freehold and copyhold estates, and entered into the possession thereof accordingly, and he forthwith thereupon transferred the sum of 10,000*l.* consols into the names of himself and William Wyndham and George Wyndham, both now deceased, in trust for the testator's nieces, as directed by his will, and in satisfaction and discharge of the legacy of that

amount thereby bequeathed to them, or for their benefit, as hereinbefore mentioned.

9. Under the circumstances hereinbefore stated, a duty, at the rate of 2l. 10s. per cent., upon the value of the said legacy or sum of 10,000l. consols, became, forthwith upon *the transfer thereof [*568 into the names of the said trustees hereinbefore mentioned, payable to the use of her Majesty, but no part of such duty has hitherto been paid.

10. The said John Heathcote Wyndham survived both of his co-trustees, and died some time since, leaving the above-named defendant, his eldest son and heir at law, and also the executor appointed by his will, him surviving. The defendant, as such executor, has proved his said father's will in her Majesty's Court of Probate, and has thereby become and now is sole trustee of the said legacy, which is at present held by him upon the trusts declared thereof by the testator's will, as hereinbefore stated, or such of them as are still subsisting.

11. As soon as the Commissioners of Inland Revenue discovered (which they did not till very recently) the gift of the said legacy, they caused application to be made to the defendant for payment of the duty owing in respect thereof; but the defendant refuses to comply with such application, alleging that no such duty is payable.

The information prayed (inter alia) a declaration that duty at the rate of 2l. 10s. was payable on the said sum of 10,000l. consols.

The defendant's answer was, so far as is material, an admission of the facts stated in the information.

The Attorney-General (with him *The Solicitor-General, Locke and Hanson*), for the Crown.—The question is, whether the sum of 10,000l. consols invested by the nephew of the testator, for the benefit of his nieces, in pursuance of the option of purchase contained in his will, is liable to legacy duty. The last surviving niece died recently, and the Commissioners of Inland Revenue then discovered the gift of this legacy. As to the rate of duty, no question arises. By the 48 Geo. 3, c. 149, schedule, *part 3, title *Legacies and Successions* (which is still in force with regard to arrears of duty [*569 which became payable between the 10th of October, 1808, and the 31st August, 1815), the rate of duty payable upon "every legacy, specific or pecuniary, or of any other description, of the amount or value of 20l. or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th of April, 1805" (as this testator did), "either out of his or her personal or movable estate, or out of or charged upon his or her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th of October, 1808," to or for the benefit of a brother or sister of the deceased or any of their descendants, is fixed at 2l. 10s. per cent. This 10,000l. consols, it is submitted, is clearly such a legacy. Either it is charged on the testator's real estate, or it is given out of moneys to arise by the sale or other disposition of his real estate. There is a sale here, with only this peculiarity, that it is to a designated individual, and at a fixed price. A conveyance is unnecessary, since, upon the consols being invested, the will directs that

the land shall enure to the use of the nephew. At any rate, the words "other disposition" are sufficiently comprehensive. Further, the Court will, even in the construction of a Revenue Act, give effect to the real substance of the transaction, and if it can thus be brought within the enactment, will not adhere strictly to a mere literal interpretation. Several authorities, decided upon a similar clause of another Revenue Act, support this proposition. The question there turned upon the words in the 55 Geo. 3, c. 184, sched., part 3, tit. *Legacies* by which the legacy duty is made payable upon "moneys *570] to arise from the sale, mortgage, or other *disposition of any real or heritable estate directed to be sold, &c." Upon the construction of that enactment it was held, in *The Attorney-General v. Simcox*, 1 Exch. 749,† and *The Attorney-General v. Mangles*, 5 M. & W. 120,† overruling *In re Evans*, 2 C. M. & R. 206,† that where the will gave to trustees a discretion as to selling, and they sold in exercise of that discretion, legacy duty attached. In *Williamson v. The Advocate-General*, 10 Cl. & F. 1, it was held that the duty attached, where a direction to sell could be gathered from the whole language of the will though there was in terms no such direction, and although the direction was never acted upon. These authorities show that the Court, in construing Revenue Acts, will adopt a reasonable construction, and not be bound by the bare letter. But, independently of this line of argument, the actual words used by the Legislature are amply sufficient to include this case.

The Court then called upon

Bovill and *Wickens*, for the defendant.—The authorities which have been cited fail to support the proposition contended for, namely, that a tax can be imposed on the subject if the case be brought within the spirit though not within the letter of the enactment. Those were not decisions enlarging the language of statutes, but upon the construction of wills, and the construction of this will is not in dispute. The *Advocate-General v. Smith*, 1 Macq. H. L. Cas. 760, is, however, an express authority, that under the statute which has been referred to (55 Geo. 3, c. 184), legacy duty is not chargeable upon real estate, except where its conversion into personalty takes place under some imperative trust or direction to that *effect; and Lord St. Leonards *571] there said that *In re Evans*, 2 C. M. & R. 206,† is not overruled by *The Attorney-General v. Mangles*, 5 M. & W. 120.† The case for the defendant is a negative one; it is, that the Crown has failed to find words in either the 45 Geo. 3, c. 28, or the 48 Geo. 3, c. 149, which include the present case. This is not a legacy out of the testator's real or personal estate, neither is it charged on his real estate, nor is it out of moneys to arise from the sale, mortgage, or other disposition of his real estate.—First, it is not a legacy out of the testator's real or personal estate. [BRAMWELL, B.—If it is given by the will and not out of the testator's personal estate; then does it not follow that it must be given out of his real estate?] No; for example, where property is given up under the doctrine of election, it would not be so. In *Laurie v. Clutton*, 15 Beav. 131, it was decided, and indeed admitted upon the part of the Crown, that legacy duty is not payable on the value of personal estate given up by one legatee to another under that doctrine.—Secondly, this is not a charge upon the

testator's real estate. All charges have this common feature, that there is a right to have the money raised out of the estate, vested in some person not the owner of the estate, and which that person may enforce against the estate, in whosoever's hands it may be. The question is clearly dealt with by the Master of the Rolls in *Laurie v. Clutton*, with the view of ascertaining whether the circumstances of that case created a charge. Here the estate was not charged either in the hands of the nieces or of the nephew. There never was a moment when any person, not the owner of the estate, had the right to have the 10,000*l.* consols raised out of the estate by a sale.—Thirdly, there is here neither a sale nor a mortgage, nor other [*572 disposition of the real estate. *A sale requires a vendor and a conveyance. Here there is neither, nor is it necessary that there should be. There is simply an executory devise to the nephew, to take effect upon his investing the consols for the benefit of the nieces. The words of the will, "that my nephew shall have the option of becoming the purchaser, or beneficial proprietor, or owner, &c.," cannot make that which was no sale, a "sale" within the meaning of the Act. The object of directing the nieces to convey, is to render it unnecessary to prove the transaction. When the obligation arises, there is, in fact, nothing for them to convey. It is not suggested that there is any mortgage.—Lastly, as the words "sale" and "mortgage" point to a dealing with the estate after the testator's death, the words "other disposition" must be similarly construed. The cutting and selling timber would be an instance of such disposition. It must be a disposition ejusdem generis with the sale or mortgage. The present case was not contemplated by the legislature, and the Crown has failed to find language sufficiently comprehensive to include it.

The Attorney-General was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the Crown is entitled to the payment of the duty sought by this information. The testator was possessed of freehold and copyhold estates, which he devised to his nieces, subject to a provision, that his nephew should have the option of becoming "the purchaser, or beneficial proprietor or owner of them at the rate or price of 10,000*l.* 3*l.* per cent. Consolidated Annuities; and, therefore, that, upon his investing the sum of 10,000*l.* of those annuities in the names of himself and other trustees, then and from thenceforth the use thereinbefore limited to the testator's said nieces should absolutely *cease and determine, and the same lands [*573 should be and enure to the only absolute use of his said nephew." The nephew transferred 10,000*l.* consols into the names of himself and certain other trustees, and entered into possession of the estate. The nieces received the dividends, and died one after another, the last surviving niece having died very lately. The Crown now claims legacy duty upon this gift of 10,000*l.* consols, and I am of opinion that the duty is payable.

I quite assent to the proposition that no person is liable equitably to the payment of a duty. The claim of the Crown cannot be sustained, unless it is made out with clearness, and so as to admit of no reasonable doubt. But we ought not to look at mere words, but at what is the substance; and the effect of this clause in the will is either to sell the estate to the nephew for 10,000*l.* consols, with a stipulation

that the money shall first be paid, by being invested in the names of trustees, or else, it is such a "disposition" as produced 10,000*l.* consols, which the testator was desirous of bequeathing to his nieces. The expression "other disposition of his real estate" cannot, in my judgment, be read in the narrow way which the defendant's counsel have suggested, viz., that because a "sale" or "mortgage" must be made by some person after the death of the testator, the words "other disposition" cannot mean a disposition made by the will itself. I cannot see any ground for such a construction, especially when in this case the testator did dispose of his real estate so as to produce 10,000*l.* consols to be divided among his nieces. If the construction contended for be adopted, any amount of personal property might be left by will without being subject to legacy duty. No one, who looks at what is expressed in the will itself, and bears in mind this possible mischief, *574] can deny that this was a "disposition" by the testator, which was calculated to raise the money. It is true there is no charge upon the estate, because the consols are to be actually invested before the estate vests in the nephew. It is said that it is an executory devise; but that does not alter the substance of the transaction. It is a "disposition" within the express words of the section, which are, "either out of his personal estate, or out of, or charged upon his real estate, or out of any moneys to arise from the sale, mortgage, or other disposition of his real estate." The moneys arise from a "disposition" by the testator's will, which gives the real estate to his nephew, upon the condition of his making this payment.

On these grounds, I think there can be no doubt as to the construction of the statute, and that the case falls both within its meaning and its language. I am therefore of opinion that the Crown is entitled to our judgment.

BRAMWELL, B.—I am of the same opinion. Upon the spirit of the Act, the Crown ought clearly to succeed. The intention of the legislature appears to have been, to impose a duty on legacies of personalty—to except real estate bequeathed to a legatee, but that, whenever the legatee got money, he was to pay the duty. We cannot however construe Acts of Parliament of this description, by the mere spirit or intention of the legislature, unless we can find words sufficiently comprehensive to carry it into effect. I incline to the opinion that there is here no "sale" of property. A sale supposes a seller, and also, I think, a conveyance; here there is neither; nor is it necessary there should be. I also incline to think that this money is not "charged" upon the estate, because there never was a time when the estate was *575] to be subject to any charge. The consideration for its acquisition by the testator's nephew was to be paid by him before he got the estate. But the framers of the Act have, as if advisedly, made use of the most comprehensive language. The words of the Act are, a legacy given by a will "either out of personal estate, or out of or charged upon real estate, or out of any moneys to arise from the sale, mortgage, or other disposition of real estate." This language supposes that there may be some disposition of an estate, out of which moneys may arise, which is neither a sale nor a mortgage; and even that money may arise out of an estate where there has been no "disposition," for the first words are, "out of the personal estate, or out

of, or charged upon the real estate." I think, therefore, that the words are sufficiently comprehensive and general to include this case. In a popular sense, the words are equally plain; for no one, although not conversant with the law, could entertain a doubt, that the testator's nieces got their money out of a disposition of his real estate. I forbear from discussing the authorities which have been cited, as they have no bearing on the point which we are deciding. The legislature has made use of language which is large enough to include this case, and I therefore think the Crown is entitled to our judgment.

CHANNELL, B.—I am of the same opinion, and upon the same grounds. Judgment for the Crown.

*KELCEY v. STUPPLES. Nov. 25.

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Upon the reference, by Judge's order, of an action for several breaches of a farming agreement, after plea, and before issue joined, it was ordered that the costs of the reference should abide the event. The arbitrators found, as to one breach, that the plaintiff had sustained damages to the extent of 16s., and on all other points substantially in the defendant's favour.—Held, that the plaintiff was not entitled to any costs of the reference: as the event was not in his favour, and there being no issues, the costs were not apportionable.

THIS was an action by a landlord against his tenant, alleging various breaches of the terms upon which he held his farm.

The declaration stated that the defendant became and was tenant to the plaintiff of a farm, messuage, buildings, and land, upon the terms that the defendant should pay for the labour required for thatching, and for the carriage of all building materials required for the said premises, and for the labour expended upon all repairs required to be done to the said premises; that the defendant should farm the said land during the said tenancy in a husbandlike manner according to the custom of the country where the same was situate; that the defendant should leave at the end of his said tenancy seven acres of good clean summer fallow, or make a proper allowance for the same; that no fodder, hay, or straw should be carried off the said farm, but should be fed out upon the said farm: that in case the defendant should sell off the said farm any hay or straw, clover, sanfoin, or any other green crop, without the consent in writing of the plaintiff, the defendant should pay to the plaintiff the sum of 5*l.* for every ton so sold; and that the defendant, at the time of his leaving the said farm, should leave all the manure on the said farm, either in the yard of the said farm or in mixens, on being paid for the cartage of the same, according to custom.—Averment: that all conditions precedent had been performed by the plaintiff.—Breaches: that the defendant had not paid for the labour required for thatching, nor for the carriage of all building materials required for the said premises, nor for the labour expended upon all repairs required to be done to the said premises; and that the defendant did not farm the said land during the said tenancy in a husbandlike manner according to the said custom; and that the defendant did not leave at the end of the said tenancy seven acres of good clean summer fallow, nor make a proper or any allowance for the same; and that fodder, hay, and

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straw were carried off the said farm by the defendant, and were not fed out on the said farm; and that the defendant did sell off the said farm hay, straw, clover, sanfoin, and other green crops, without the consent in writing of the plaintiff, and had not paid to the plaintiff the sum of 5*l*. for every ton so sold, or any sum of money whatsoever; and that the defendant, at the time of his leaving the said farm, did not leave all the manure on the said farm, either in the yard of the said farm or in mixens, on being paid for the cartage of the same according to custom; and the plaintiff claimed 100*l*.

Pleas.—First, to so much of the declaration as charged that fodder, hay, and straw were carried off the said farm by the defendant, and were not fed out on the said farm:—A traverse.

Second, to so much of the declaration as alleged that the defendant sold off the said farm hay, straw, clover, sanfoin, and other green crops:—A traverse.

Third, to the residue of the declaration:—Payment of 10*l*. into Court.

The cause was by Judge's order and consent referred without issue being joined, to two lay arbitrators. The order of reference contained no direction as to the costs of the cause, but directed that the costs of the reference should abide the event.

The arbitrators' award (so far as material) was as follows:—"We award and find that the defendant has paid into Court the sum of *578] 10*l*., and that the plaintiff has accepted the same in full satisfaction and discharge of all causes and rights of action in the declaration mentioned, not hereinafter specified. And we further award and adjudge that the land in the said declaration mentioned has been farmed by the defendant during his tenancy fairly, and in a husband-like manner, according to the custom of the country, and for the benefit and advantage of the estate of the plaintiff. And we further award and adjudge that the plaintiff has sustained damages by reason of the alleged breach of covenant on the part of the defendant in removing straw from the said farm, in the said declaration mentioned, and in not feeding the same upon the said farm, in the sum of 16*s*., which sum we award and direct the defendant to pay to the plaintiff. And we further award and adjudge that the plaintiff has sustained no damages by reason of the breach of covenant on the part of the defendant, in the said declaration alleged, in removing fodder or hay from the said farm, and in not feeding the same upon the said farm. And we further award and adjudge that the plaintiff has sustained no damages by reason of the breach of covenant on the part of the defendant, in the said declaration alleged, in selling off the said farm hay, straw, clover, sanfoin, and other green crops, without the consent and payment therein mentioned. And we further award and adjudge that the plaintiff has sustained no damages by reason of the breach of covenant on the part of the defendant, in the said declaration alleged, at the time of his leaving the said farm, in not leaving all the manure on the said farm, either in the yard of the said farm or in mixens, on being paid for the cartage of the same according to custom."

The plaintiff took up the award, and paid the arbitrators' fees. He then made out his bill of costs, and gave the defendant notice of tax-

ation, and both parties attended *before the Master; but the Master declined to tax the bill. The order of reference had [*579 been made a rule of Court.

Francis had obtained a rule to show cause why the Master should not tax the plaintiff his costs of the reference, upon the ground that the event was in the plaintiff's favour, citing *Jones v. Jones*, 7 C. B., N. S. 832 (E. C. L. R. vol. 97), and *Wigens v. Cook*, 6 C. B., N. S. 784 (E. C. L. R. vol. 95).

Hayes, Serjt., showed cause.—The event of the reference is not in the plaintiff's favour: the substantial finding is for the defendant. The declaration contains numerous breaches, and several distinct questions were in difference in the action; except on one minor point, on which 16s. was awarded to the plaintiff, the finding was in favour of the defendant. There can be no costs of particular issues, for issue was not joined, nor are any issues found by the arbitrators. The question is, therefore, divested of the technicalities of issues, and is simply in whose favour is the event of the reference. In *Russell on Awards*, p. 380, 2d ed., the general rule is thus stated:—“When, on a reference of a cause and all matters in difference, the submission provides that the costs of the cause and of the reference are to abide the event of the award, that, as a general rule, it is said (though some cases hold differently), will be construed to mean the general event of the award, and that each party will have to pay his own costs, unless everything be decided in favour of one party.” Thus, in *Boodle v. Davies*, 3 A. & E. 200 (E. C. L. R. vol. 30), on a reference of a cause and all matters in difference, the costs of the action, reference, and award were to abide the event of the award, and though the action was trespass, and the arbitrator found that the trespasses had been committed, as the award adjudged some matters in favour of each party the *Court held that the plaintiff was not [*580 entitled to the costs. Lord Denman, C. J., there said: “As far as regards costs we think the defendant is right. As the award is drawn, he may have gained much more by it than the plaintiff; and the agreement of reference makes no provision for costs in the event of an award like the present.” So, in *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29), the costs of the suit, reference, and award were to abide the event of the award, and the arbitrator directed that the defendant should deliver certain goods to the plaintiff, and the plaintiff pay a sum of money to the defendant, upon which payment proceedings in the suit should cease, and each give the other a general release, and it was held that the event was that each party should pay his own costs. In the cases relied on by the other side, the direction was, that the costs of the cause should abide the event. The question, therefore, was as to the event of the cause, and not of the reference. Independently of that distinction, *Jones v. Jones* does not apply. There, on a reference of a cause before trial, the arbitrator found for the plaintiff on the issue of never indebted, and for the defendant on a set-off, and awarded the balance of 3*l.* to the plaintiff. The only question raised was whether the 3*l.* could be considered as recovered in the action within the meaning of the County Court Act, 13 & 14 Vict. c. 61. Here, if due weight be given to the fact that the cause is referred in such a way as to be disembarrassed from all

technicalities of issues, the rule must prevail that neither party is entitled to costs unless he be substantially successful.

Francis, in support of the rule.—Where the plaintiff in an action recovers any sum, however small, and however much of his case has been successfully answered, he is entitled to the general costs of the cause; and those general costs include costs arising from the investigation of the *defendant's case. The authorities establish that *581] the same rule applies where the action is referred, and the distinction taken on the other side between costs of the cause and costs of the reference is not well founded. The cases of *Boodle v. Davies*, 3 A. & E. 200 (E. C. L. R. vol. 30), and *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29), are inapplicable to the present case. In neither of those cases was it possible for the Court to determine in whose favour the event was, for there was a direction by the arbitrator that something should be done by each of the litigant parties. In *Griffiths v. Thomas*, 4 D. & L. 109, where all matters in difference in a cause were referred by Judge's order, the costs of the suit to abide the event of the award, and the arbitrator assessed the plaintiff's damages at sixpence, it was held that the plaintiff was entitled to costs. Coleridge, J., in delivering judgment, there said:—"It seems to me that the true meaning of the submission is what its words import, that costs, *i. e.*, the payment of costs, should follow the event—*i. e.*, the legal event of the award—that he in whose favour the decision was should be paid by the other party the costs of the suit." [BRAMWELL, B.—In that case all the issues were found for the plaintiff.] In *Jones v. Jones*, 7 C. B., N. S. 832 (E. C. L. R. vol. 97), no such distinction was made as is here attempted between costs of the cause and costs of the reference. In that case Byles, J., was of opinion that the plaintiff was entitled to the costs of the reference and award, though not to the costs of the cause. [CHANNELL, B.—There the event was clearly in the plaintiff's favour. The only question raised was whether the amount awarded entitled the plaintiff to costs. POLLOCK, C. B.—The set-off merely entitled the defendant to deduct what he proved under it.] In *Wigens v. Cook*, 6 C. B., N. S. 784 (E. C. L. R. vol. 95), the costs of the cause were to abide the event, and the costs *582] of the *reference to be in the discretion of the arbitrator. All the issues but one were found for the defendant, and on that a farthing for the plaintiff, on a count in trover. The arbitrator gave the defendant the costs of the reference and did not certify; but the Court held that the plaintiff was entitled to the costs of the cause. Cockburn, O. J., in giving judgment, said:—"The agreement of the parties is that the costs of the cause shall abide the event of the award, and the event is in favour of the plaintiff. The consequence must necessarily follow." [BRAMWELL, B.—The finding here is not capable of being divided into issues.] It is a finding in the plaintiff's favour. The defendant only traversed two breaches, and paid money into Court to the residue of the declaration. As to one breach, the finding is for the plaintiff, as to the other, that the plaintiff has sustained no damage by the alleged breach. The event of the award is, that the defendant is to pay and the plaintiff to receive.

POLLOCK, C. B.—I am of opinion that the Master acted correctly in refusing to tax the plaintiff's costs, and that this rule should be

discharged. The error in the argument of the plaintiff's counsel consists in his applying, to a reference of an action before issue is joined, the same doctrines which are applicable where a cause has gone down to trial and there has been a verdict upon the issues joined on the pleadings. In such a case, the plaintiff and defendant are each entitled to the costs of all the issues on which they respectively succeed. If, on the whole result, the plaintiff has so far succeeded upon a single issue, that a complete answer is not established to all the causes of action in the declaration, the plaintiff is entitled to the general costs of the cause. Upon taxation before the Master, the circumstances of the case are gone into, and complete justice can be done. But where a cause is referred, as here, before *issue has been joined, and [*583 it is agreed between the parties that the costs of the reference shall abide the event, no such rule can be applied. The party who succeeds is entitled to the costs. Here, if it were necessary for us to decide whether the plaintiff or the defendant has succeeded, I should say the defendant has substantially succeeded much more than the plaintiff. It would, I think, be neither in accordance with good sense or with justice, to hold, that where, out of a number of questions in difference, one unimportant point is found in favour of the plaintiff, and every other matter in favour of the defendant, that the event of the reference is in the plaintiff's favour. For these reasons I am of opinion that this rule should be discharged.

BRAMWELL, B.—I also think the Master was right, and I base my opinion upon the grounds which have been stated by the Lord Chief Baron. I was at first struck by the argument, that the arbitrator has found something in favour of the plaintiff and nothing against him; but the answer is, that, if the one question which was found in the plaintiff's favour had not been so found, the finding would on every point be for the defendant. It cannot be said that this is a finding more in favour of the plaintiff, than of the defendant. Where, indeed, an action is pending, in which issue has been joined, and judgment can be signed, so that particular costs can be ascribed to particular issues, if the costs are to abide the event, the plaintiff obtains the costs of the issues on which he succeeds, and so does the defendant. Thus it is correctly stated in *Gray on Costs*, p. 416, that "where the costs abide the event, each party is in general entitled to the costs of issues found for him." But, in the present case, neither can judgment be signed, nor are any issues found; and if the arbitrators were requested to find the issues, they would not be bound to do so. We must look then at the substantial event, and in *my judgment [*584 there is no such event, as will entitle the plaintiff to the costs of the reference; and there can be no taxation of particular issues, because the costs are not apportionable. I think, therefore, that this rule should be discharged.

CHANNELL, B., concurred.

Rule discharged.

FREDERICKS, Appellant, PAYNE, Respondent. Nov. 12.

A booth theatre, which is taken to pieces, and carried from place to place for theatrical representations, is a "place" within the meaning of the 11th section of the 6 & 7 Vict. c. 68, and a person causing a stage play to be acted therein for hire, is liable to the penalty imposed by that section, if it be not licensed, and not a patent theatre.

CASE stated by a Lambeth Police Magistrate under the 20 & 21 Vict. c. 43 :—

This was a proceeding under the Act for regulating theatres, 6 & 7 Vict. c. 68. The appellant was summoned at the instance of the Commissioners of Police, under the 11th section of that Act, "for that he did, on the 27th day of May, 1862, at Camberwell, in the county of Surrey, unlawfully, for hire, cause, permit, and suffer to be acted and presented a certain stage play, in a place there situate, not being a patent theatre, or duly licensed as a theatre."

On the hearing it was proved that the appellant was the manager of a booth or temporary or portable theatre, hereafter described, and the manager of a company of strolling players, and that, on the day mentioned in the information, he did, for hire, cause, permit, and suffer to be acted and presented a stage play in the said booth, and that the said booth was not a patent theatre, or licensed as a theatre. At the time of the alleged offence the said booth was on a piece of private ground, which had been rented by one Abraham Fox, for the purpose of holding thereon a pleasure fair, not legal or licensed in any way.

The booth had painted on it these words, "Olympic Theatre," and *585] consisted of two caravans or wagons, which *were drawn from place to place by horses, and when the said two caravans or wagons were joined together, and covered with canvas supported by poles resting on the ground, they formed a temporary booth with a stage therein, and capable of holding about 800 persons. The said caravans or wagons rested on wheels, and could be moved away with the poles, canvas, &c., in an hour or two, without any difficulty, and it was the custom of the proprietor of the said caravans or wagons to move them about frequently from place to place, for the purpose of converting them into a booth.

It was contended, on behalf of the appellant, that he had committed no offence, because the said booth was not a "place" within the meaning of the 6 & 7 Vict. c. 68, s. 11; that the 11th section must be read in conjunction with the 2d section of the Act; and that, as it was not an offence under section 2 to keep such booth for the public performance of stage plays without a license (*Davys v. Douglas*, 4 H. & N. 180†), it was not an offence to permit a stage play to be acted therein, and that "place," in section 11, means such a "house or place of public resort" as requires a license under section 2.

I was of opinion that the said booth was a "place" within the meaning of section 11, and therefore convicted the appellant of the offence charged in the information, and adjudged him to forfeit and pay the sum of 3*l.*, with 2*s.* costs. The ground of my decision was that the word "place," in section 11 is used generally, without any such restriction as was contended for on the part of the appellant. That the only exception was that contained in section 23 of the Act, namely, that of "a theatrical representation in any booth or show

which, by the justices of the peace, or other persons having authority in that behalf, shall be allowed in any lawful fair," which this was not.

*The question of law submitted is, whether or not the said booth before described is a "place" within the meaning of the [*586 6 & 7 Vict. c. 68, s. 11. If the Court shall answer this question in the affirmative, the said conviction to be affirmed; if in the negative, the conviction to be quashed.

Field, for the respondent.—The question turns on the construction of the Act for regulating theatres, 6 & 7 Vict. c. 58.(a) By section 2 a penalty is imposed on every person who shall, without license, have or keep any house or other place of public resort, for the public performance of stage plays. By section 11 a penalty is imposed on *every person who for hire shall act or cause, permit, or suffer [*587 to be acted, any part in any stage play, in any place not being a patent theatre, or duly licensed as a theatre. By section 16, whenever money is taken for the admission of any person to see any stage play, "every actor therein shall be deemed to be acting for hire." The 23d section defines the meaning of the word "stage play," and provides that the Act shall not apply to any theatrical representation in any booth or show which shall be allowed by justices in any lawful fair. The defendant, by acting in this booth, acted in a "place not being a patent theatre, or duly licensed as a theatre," and therefore incurred a penalty under the 11th section. *Davys v. Douglas*, 4 H. & N. 180,† only decided that a booth theatre, which is taken to pieces and carried from place to place for theatrical performances, is not "a house or other place of public resort for the public performance of stage plays," within the meaning of the 2d section. In *Fredricks, app., Howie, resp., antè*, p. 381, the question arose upon the

(a) The following were the sections to which reference was principally made in the arguments and judgment:—

Section 2. "That, except as aforesaid, it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays, without authority by virtue of letters patent from her Majesty, her heirs and successors, or predecessors, or without license from the Lord Chamberlain of her Majesty's Household for the time being, or from the justices of the peace, as hereinafter provided; and every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the Court in which, or the justices by whom he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been so kept open by him for the purpose aforesaid, without legal authority."

Section 11. "That every person who, for hire, shall act, or present, or cause, permit, or suffer to be acted or presented, any part in any stage play, in any place, not being a patent theatre or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the Court in which, or the justices by whom he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend."

Section 16. "That in every case in which any money or other reward shall be taken or charged directly or indirectly, or in which the purchase of any article is made a condition for the admission of any person into any theatre to see any stage play, and also in every case in which any stage play shall be acted or presented in any house, room, or place in which distilled or fermented exciseable liquor shall be sold, every actor therein shall be deemed to be acting for hire."

Section 23. "That in this Act the word 'stage play' shall be taken to include every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof: provided always, that nothing herein contained shall be construed to apply to any theatrical representation in any booth or show which by the justices of the peace, or other persons having authority in that behalf, shall be allowed in any lawful fair, feast, or customary meeting of the like kind."

Metropolitan Police Act, 2 & 3 Vict. c. 47, and it was held that a booth theatre was not a "tenement," within the meaning of the 46th section of that Act.

Poland, for the appellant.—This booth is not a "place" within the meaning of the 6 & 7 Vict. c. 68, s. 11. If the word be read without any limitation, an actor engaged at a private house, or even amateur performers for a charity, if money were taken for admittance, would be liable to the penalty imposed by this section. The word "place" must necessarily be read with some addition: thus it may either *588] be read as "place requiring a license," or "such place," having reference to the same word in the 2d section. It is argued that, by the 16th section, "acting for hire" means acting a stage play in *any place* where money is taken for admission to see it. But that is not so. To prevent an evasion of the Act that section facilitates the proof of "acting for hire." "Hire," as defined by Johnson, is, "wages paid for service." The paid actor at a private house would be an "actor for hire" within that definition. The Act seems not to have contemplated a license being granted to a booth of this description. It is very doubtful whether the magistrates have power to grant it. The 2d section prohibits, under a penalty, the "having or keeping *any house or other place of public resort*" for the performance of stage plays without letters patent or a license; and in *Davys v. Douglas*, 4 H. & N. 180,† it was expressly decided that a person who keeps a booth-theatre such as this is not liable to a penalty under that section. The language of the 5th section clearly contemplates the granting of licenses only to places that are fixed and permanent, and not to a mere temporary erection. If, in such a case, there be any power to grant a license, by that section, it must be taken out in every jurisdiction into which the booth is carried. In sects. 6, 7, 9, and 17, the subject for a license is styled a "theatre." The proviso in the 23d section, from which, at first sight, an inference might be drawn unfavourable to the appellant, only applies to those descriptions of booths or shows which would be "places of public resort," within sect. 2, and, when not within the proviso, require a license. An enactment, by which it is no offence to keep a booth-theatre, can hardly be construed to impose a penalty on any one who acts in it for hire.

*589] *Field*, in reply.—*Davys v. Douglas* was not a decision on *the language of the 11th section, but of the 2d, and therefore no authority in favour of the appellant.—He was then stopped by the Court.

POLLOCK, C. B.—We are all of opinion that the decision of the magistrate may be supported. The case is brought within the express words of the 11th section of the Act. [His lordship read the section.] This is neither a patent theatre, nor duly licensed as a theatre. A minute examination of the other sections is unnecessary, since the words of this section are plain and free from doubt.

BRAMWELL, B.—I am of the same opinion. The words of the 11th section, if they are to be read in their literal sense, certainly include this case. The appellant has acted for hire a part in a stage play in a "place" which is not a patent theatre, nor duly licensed as a theatre. It is contended, however, that the word "place" means a "place which

requires a license." The introduction of words into an Act of Parliament is open to serious objections, and should only be resorted to for the most cogent reasons, so as to avoid a repugnancy of construction, or something which is opposed to good sense. But here it would be opposed to good sense to introduce any words, since it would interfere with the very object which the legislature had in view, viz. to prohibit unlicensed play acting. By the 2d section it is provided, that no person "shall have or keep any house or other place of public resort, for the public performance of stage plays," without letters patent or a license; and a penalty is imposed upon any one who shall keep open any such house or place for that purpose. That is an express prohibition against *keeping* such a place, and, in addition, a penalty is imposed on the person who keeps it. But that alone would not be sufficient. If the *statute had stopped there, any person [590 might act at a place not so *kept*, without becoming liable to any penalty. Thus, a band of strolling players, acting in barns, and similar places not *kept* for the purpose, might cause the mischief which it was the object of the legislature to provide against. But the 11th section prohibits the *acting* for hire in all places, except those that are licensed, whether they be *kept* for the public performance of stage plays or not, and so forms a necessary complement to the 2d section. This view is also confirmed by the proviso in the 23d section. [His lordship read the proviso.] It seems a legitimate inference that booths and shows in a fair, if not excepted by the terms of that proviso, are within the scope of the 11th section. Now, the only reason which is urged for introducing any words is, that if the 11th section applies to all persons who act for hire in any place that is not licensed, then, if a private gentleman were to engage an actor to take part in a play at his own house, that actor would be liable. That result is, I think, attended with less inconvenience than would arise, as I have pointed out, from the proposed construction. But it is by no means certain that it would be so. The 16th section points out in what cases an actor shall be deemed to be acting for hire, and would seem to show that the hire, which the Act contemplates as a necessary constituent of the offence, must be a hire received from the spectators. On that point, however, it is unnecessary to express any opinion, since, for the reasons I have given, it seems to me that this conviction should be affirmed.

CHANNELL, B.—I also think that this conviction ought to be affirmed. The case expressly finds that the appellant caused a stage play to be acted for *hire*. On that point, therefore, no question arises. The 23d section has been referred to; but as the facts of this case do not bring it *within the proviso contained in that section, it [591 can only be of use in assisting us to ascertain the true meaning of the 11th section. Unless, therefore, the word "place" in the 11th section must, by reference to the 2d and 23d sections, of necessity be read with some addition, the appellant was rightly convicted. I am of opinion that there is no such necessity. There is nothing in either of these sections to require it; nor is the 2d section, when rightly interpreted, in any way inconsistent with the 11th section. I therefore agree with the other members of the Court that our judgment should be for the respondent.

Conviction affirmed.

BRAITHWAITE v. MARRIOTT. Nov. 25.

A sheriff is not entitled to deduct the expenses of advertising a sale by public auction of the execution-debtor's effects, seized under a writ of *fi. fa.*, although the debt or damages exceed 50*l.*, and the 24 & 25 Vict. c. 134, s. 74, renders it imperative on the sheriff in such case to advertise and sell by auction.

GATES had obtained a rule calling on the sheriff of Surrey to show cause why he should not refund to the plaintiff the sum of 15*s.*, the excess overcharged by him upon the levy under a writ of *fi. fa.*, and on the sheriff's officer to show cause why a writ of attachment should not issue against him for his contempt in demanding and taking from the plaintiff such excess contrary to the 1 Vict. c. 55.

It appeared from the plaintiff's affidavits that the writ was endorsed to levy 185*l.*; that the sheriff sold by public auction, and the proceeds of the sale amounted only to 68*l.*, from which the sheriff claimed to deduct, among other items, 15*s.* which had been paid for three advertisements of the sale. Notice had been given to the sheriff that the legality of this deduction would be contested.

Abbott now showed cause.—The 24 & 25 Vict. c. 134, s. 74, enacts, "that wherever the goods and chattels of a debtor are sold under an execution upon any judgment *recovered in any action or suit *592] brought for the recovery of a debt, money demand, or damages, against any debtor, exceeding 50*l.*, such goods and chattels shall in all cases unless the Court shall otherwise direct, be sold by the sheriff by public auction, and not by bill of sale or private contract, *and such sale shall be publicly advertised by the sheriff* on and during three days next preceding the day of sale." The 73d section contains a proviso that in case of bankruptcy the costs and expenses of the action and execution shall be retained and paid out of the proceeds of the sale, and the balance only be paid to the assignees. The legislature could never have intended that the sheriff should deduct the expenses, which the Act enjoins, only in the event of a bankruptcy. The duty of advertising is imposed on the sheriff by the express words of the enactment; the expenditure is therefore compulsory. There is no provision in the 28 Eliz. c. 4, or 1 Vict. c. 55 (by which statutes the sheriff's poundage and fees are regulated), to reimburse him for this outlay. [POLLOCK, C. B.—The sheriff was at common law bound to perform all his duties without remuneration; the right to it, therefore, depends on the statutes which create it.] The claim is not for work done, but to be recouped for a compulsory disbursement. [BRAMWELL, B.—The sheriff's poundage and auction fees vary in proportion with the success of the sale.]

Gates, in support of the rule.—The sheriff, in addition to his poundage fees, is entitled by the table of fees, allowed in accordance with the provisions of the 1 Vict. c. 55, s. 2, to take 5*l.* per cent. on every sale by auction which does not produce more than 300*l.* The 24 & 25 Vict. c. 134, s. 74, makes it imperative on the sheriff to do that which it was previously his duty to do whenever there was a sale by *593] auction, viz., to take proper steps to make the sale public. *If it was not the practice to advertise, that only shows that the sheriffs neglected that duty.

Per CURIAM.(a)—The rule must be absolute, but the attachment will lie in the office for a fortnight. Rule accordingly.

(a) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

HYDE v. GRAHAM. Nov. 19.

To trespass for entering the plaintiff's close and breaking open a gate and lock with which it was fastened, the defendant pleaded (as a defence on equitable grounds), that a dispute had arisen between the plaintiff and defendant and certain other persons as to whether there was a public highway over the plaintiff's land; and thereupon, in order that the defendant and the plaintiff's solicitor might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the question, and in consideration that the defendant and the other persons, at the request of the plaintiff, then signed the same, it was, by a memorandum in writing, then signed by the plaintiff, his solicitor, the defendant, and the said other persons, agreed that, without prejudice on either side to the question of right to the said way, it should remain open and unobstructed, for the passage of the defendant and the said other persons, until the plaintiff's solicitor and the defendant should come to a definite understanding as to the course to be pursued in deciding or trying the question then in dispute. The plea then stated that the alleged trespasses were committed before any understanding had been come to, and were the use of the way by the defendant; and, because the gate was wrongfully and contrary to the agreement placed across the way and locked, the defendant broke it open.—Held, that the plea was bad both as an equitable and legal defence.

A plea pleaded as an equitable defence may be sustained as a plea at law if it discloses a good legal defence.

DECLARATION.—For that heretofore, to wit, on, &c., the defendant broke and entered certain land of the plaintiff, called "The Hyde End Estate," situate, &c., and then broke open a certain gate of the plaintiff then standing and being in and upon his said land; and then broke open, damaged, and spoiled a certain lock of the plaintiff wherewith the said gate was then locked and fastened, and then on divers times on the same day, with a certain carriage and horses, drove over and across the said land of the plaintiff.

Plea, for defence on equitable grounds.—That, before the alleged trespasses in the declaration mentioned, or any *of them, a [594 question and dispute had arisen between the plaintiff and the defendant and certain other persons as to whether there was a public highway by and near to a certain house of the plaintiff, or a public highway over the said land of the plaintiff; and thereupon, in order that the defendant and T. Rooke, the solicitor of the plaintiff, might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the said question, and in consideration that the defendant and the said other person, at the request of the plaintiff, then signed the same, it was, by a memorandum in writing, then signed by the plaintiff, the said T. Rooke, and the defendant, and the said other persons, agreed between the plaintiff and the defendant, and the said other persons, that, without prejudice on either side to the question of right to the said way by the said house or the said way over the said land of the plaintiff in the declaration mentioned, the said last-mentioned way should remain open and unobstructed for the passage of the defendant and the said other persons until the said T. Rooke and the defendant should come to a definite understanding as to the course to be pursued in deciding or trying the question then in

dispute; and that the defendant and the said other persons thereby pledged themselves to evidence that the said agreement was without prejudice to the plaintiff's claim. And the defendant says that all things happened necessary to entitle the defendant to have the said agreement observed and kept by the plaintiff, and that the alleged trespasses were committed by the defendant after the said agreement was so made and signed, and before any understanding had been come to between the said T. Rooke and the defendant, and were the use by the defendant of the said last-mentioned way; and the defendant, at *595] the time of the said alleged *trespasses, having occasion to use and using the said way with a carriage and horses as in the declaration mentioned, because the said gate had been and was wrongfully and contrary to the said agreement placed and kept, and was then standing in and across the said way, locked and fastened and obstructing the same, so that without breaking open the said gate and lock and a little damaging and spoiling the same, the defendant could not then pass along the said way, the defendant then, in order to remove the said obstruction, broke open the said gate and lock and a little damaged and spoilt the same, doing no unnecessary damage, and passed along the said way with the said carriage and horses, which are the supposed trespasses above complained of by the plaintiff; and that the defendant has a right, under the said agreement and circumstances aforesaid, by an injunction from a Court of equity, to have the plaintiff restrained from maintaining or prosecuting the said action against the defendant in respect of the matters in the declaration mentioned.

Demurrer and joinder therein.

Gray, in support of the demurrer.—The plea discloses no defence either at law or in equity. The agreement is without consideration, and, not being under seal, it cannot confer any interest in the land. The alleged consideration is the signing the agreement, but it is not sufficient to support it.

The Court then called on

Dowdeswell (*Secker* with him), for the defendant.—The plea affords a good answer both at law and in equity. Though pleaded by way of equitable defence, if it discloses an answer on legal grounds, the *596] defendant will be entitled *to judgment. First, the plea is good at law, for the facts stated in it would be evidence in support of a plea of leave and license. The agreement amounts to a contract on the part of the plaintiff that, during a certain interval, the way shall remain open and unobstructed for the passage of the defendant. Therefore he was justified in breaking open the gate in order to use the way. [POLLOCK, C. B.—Not until after he had demanded the key. But if the license has been revoked, what right is left?] The plaintiff cannot avail himself of his breach of contract to sue the defendant as a trespasser. In *Burridge v. Nicholetts*, 6 H. & N. 383,† it was held that a person might break open a lock in order to get possession of his own book. [CHANNELL, B.—There the question arose under the County Court Act, 9 & 10 Vict. c. 95]. This is, in effect, an agreement that, if the plaintiff obstructs the way with a locked gate, the defendant may open it.—Secondly, the plea affords a good defence on equitable grounds. The fact that the agreement is indefinite in point of time does not invalidate it. It is a sufficient

consideration in equity that third persons are parties to it, and it may be supported on the same principle as an agreement of reference. If it had been under seal it would have been irrevocable; and in equity there is no distinction between instruments under seal and by parol. The plaintiff has acted contrary to conscience and good faith, and on that ground a Court of equity would restrain this action by a perpetual injunction. A Court of equity would also restrain the action on the ground that it is unjustifiable and vexatious. In Story on Equity Jurisprudence, § 904, it is said: "Cases often arise in which a party may be entitled to proceed in a suit at law for damages, when a complete equitable defence exists, which is yet incapable of being asserted at law. In such cases the suit at law is treated as vexatious, *and will be stayed by injunction." After giving several [*597 instances, the author proceeds to say:—"Indeed, there can scarcely be found an end to the enumeration of cases in which vexatious suits of this sort have been suppressed by injunctions when there was no redress at law, and yet when, upon the principles of justice the party was entitled to complete protection against such litigation." The jurisdiction of a Court of equity to restrain by injunction an act which a party is by contract bound to abstain from is not confined to cases in which there are either no other executory terms in the contract, or none which a Court of equity has not the means of enforcing: *Dietrichsen v. Cabburn*, 2 Phil. 52. Wherever a person has entered into an agreement either to do or abstain from a particular act, a Court of equity will interfere to prevent a violation of that agreement. In *Phillips v. Treeby*, 8 Jur. N. S. 711, the Court granted an injunction to restrain the defendant from obstructing a way which he had agreed that the plaintiff should use.

POLLOCK, C. B.—I am of opinion that the plea affords no defence to the action, either on legal or equitable grounds. If the plaintiff has broken his agreement by placing a gate across the way, the defendant should have brought a cross-action; he has no right, so to speak, to help himself to the performance of the contract. That might be productive of great mischief to the plaintiff. It seems to me that the placing a gate across the way was a practical statement to the defendant and the other parties that the plaintiff did not mean to perform the agreement, and that he would in future treat the defendant as a trespasser if he used the way. The defendant had no right to turn a mere license into a right to open the gate, even with a key. Therefore, in my opinion, this is not a good legal plea.

*I also think that it is not a good equitable plea. Courts [*598 of law have laid down certain rules for their guidance in the case of pleas on equitable grounds; and it is now established that, unless the right is such that a Court of equity would grant a perpetual injunction, it cannot be made the subject of an equitable plea. I am not aware, however, of any decision applicable to the present case. In order that some arrangement might be made as to the best course to be pursued in deciding a disputed right of way, the plaintiff, by way of concession, says to the defendant:—"The way shall remain open and unobstructed for your passage until that is settled." Nothing can be more indefinite; and the defendant has no right to treat it as a definitive arrangement and break open the gate which the

plaintiff has placed across the way. It would be contrary to all principle to hold this a good equitable plea. No doubt, in Blackstone's Commentaries, vol. 3, p. 4, some instances are given where a person is allowed to obtain redress by his own act as well as by operation of law, but the occasions are very few; and they might constantly lead to breaches of the peace, for if a man has a right to remove a gate placed across the land of another, he would have a right to do it even though the owner was there and forbade him. The law of England appears to me, both in spirit and on principle, to prevent persons from redressing their grievances by their own act. The argument for the defendant comes to this:—"You agreed that for some indefinite period I should be at liberty to use the way, therefore I have a right to the performance of that agreement notwithstanding you would rather pay damages than abide by it; and as I am entitled to apply to a Court of equity to restrain this action, I can plead the facts by way of equitable defence." But I think a Court of equity would not *599] restrain the action. It may be, that after a person *has made an agreement of this kind, he finds out that by performing it he may do himself or some other person irreparable mischief; and, rather than perform it, he is content to pay damages for breaking it. For these reasons it appears to me that the plea is bad, and that there ought to be judgment for the plaintiff.

BRAMWELL, B.—I am also of opinion that the plea is bad both as a legal and an equitable defence. Mr. *Dowdeswell* says that it is good as a plea of leave and license, but it is not in terms so pleaded. Neither does it contain any allegation of leave and license, for it states that because the gate was wrongfully and contrary to the agreement placed across the way, locked and fastened, the defendant broke it open. When the defendant found the gate locked, that was a tolerably clear intimation to him that the license was revoked, and the plaintiff did not intend to perform the agreement. It seems to me that the defendant had no right to break open the gate, and the plea, which professes to justify all the trespasses, being bad in part is bad altogether.

Then, as to its being a good equitable plea, the answer has been already given by my Lord. There would be difficulty in a Court of equity saying, "We will restrain you from revoking your license, absolutely and without any qualification of any kind." If the defendant applied for a specific performance of the agreement, surely a Court of equity would say: "You were to come to some arrangement as to the course to be pursued in deciding the disputed right of way, we will only restrain the plaintiff from revoking the license upon the terms that you forthwith come to that arrangement." I therefore think that a Court of equity would not, by injunction, restrain the plaintiff from proceeding with this action. Another difficulty is this—the *600] way is to remain open without prejudice on either side to the question *of right to it. Now, suppose that, in using the way, some damage is done to the soil, and it is afterwards decided in the mode arranged between the parties that there is no way over the plaintiff's land, would he not be entitled to claim compensation for the damage? But if the defendant succeeded on this plea, the plaintiff never could recover damages for what would be an unjustifiable

trespass, because he would be barred by this action in respect of it. It seems to me, not only on the grounds stated, but taking a common sense view of the matter, that the plea is bad.

CHANNELL, B.—I agree that our judgment ought to be for the plaintiff. I do not dispute the proposition, that a plea pleaded by way of equitable defence may be sustained as a plea at law provided it discloses a good legal defence. But it cannot be good at law unless it answers what it professes to answer. This plea professes to justify all the trespasses alleged in the declaration, and ought therefore to answer the whole,—apart from what is mere matter of aggravation. The breaking open the gate is a substantive ground of complaint, and that is not answered by the plea. I do not deny what has been urged at the bar, that an agreement which, not being under seal, cannot be enforced at law, may, in some cases, be pleaded as a license, so as to excuse a trespass. But here, as my brother Bramwell observed, the plea is not in form a plea of leave and license; and we must look at the whole matter alleged, and ascertain, not only whether a license has been granted, but whether it continued unrevoked at the time the trespasses were committed, so as to excuse them. I am clearly of opinion that, though this agreement may amount to a license, it was not a license which was irrevocable, and that the plaintiff must be considered as having revoked it to this extent; that, though the defendant might have a right to use the *way up to the gate, [*601 he was not justified in breaking it open. I therefore think that the plea is bad in law.

I also think that it cannot be sustained as a defence in equity. On this point I entertain the same opinion as the Lord Chief Baron and my brother Bramwell, and I think it unnecessary to repeat the reasons which they have already given.

Judgment for the plaintiff.

BROWN and Others v. THE LOCAL BOARD OF HEALTH OF HOLYHEAD. Nov. 14.

The 34th section of the Local Government Act, 1858 (21 & 22 Vict. c. 98), empowers every local Board to make by-laws "with respect to the level, width, and construction of new streets; and to provide for the observance of the same by enacting therein such provisions as they think necessary as to the power of the local Board to remove, alter, or pull down any work begun or done in contravention of such by-laws." By section 35, "when any house or building has been taken down in order to be rebuilt or altered, the local Board may prescribe the line in which any house or building to be thereafter built shall be erected, and the same shall be erected in accordance therewith; and the local Board shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back."

A local Board made a by-law which provided that "if any owner or person should construct or cause to be constructed any works, or do any act, or omit to do any act, or comply with any requirements of the local Board, or should make any alterations in any works after they have been completed, whether in new or existing buildings, contrary to the provisions therein contained, the local Board might cause such works to be removed, altered, or pulled down."—Held, that the by-law was invalid as exceeding the powers conferred by the Act.

THIS was an action in trespass by the plaintiffs to recover damages by reason of the defendants having broken and entered a close of land

of the plaintiffs, and broken down and destroyed the wall or boundary fence thereof, and pulled down and damaged the railings and gates thereon, and damaged and destroyed the steps and coping and wall thereof. By consent and order of a Judge a case was stated for the opinion of this Court, without pleadings (so far as material), as follows:—

*602] In 1859 the plaintiffs became the lessees of a piece of land *in the town of Holyhead, adjoining Market Street. The lease was for ninety-nine years, and contained covenants by the plaintiffs to erect a dwelling-house and other buildings thereon.

The land was four or five feet higher than the street, and was at the time of the lease bounded by a retaining wall, which belonged to the lessors and was included in the lease. In consequence of the different levels of the street and land, the plaintiffs, who had obtained the lease for the purpose of erecting a chapel, school, and house upon it, had to set their buildings back from the street in order to leave room for placing steps on their own land to form an approach from the street; and for the purpose of building the chapel and house it was necessary to pull down the old wall and clear away the soil so as to make a part of it level with the street.

The chapel and house were erected in 1859 and the beginning of 1860, and before the town of Holyhead was placed under the Local Government Act, 21 & 22 Vict. c. 98. Subsequently to the town being placed under the Local Government Act, the plaintiffs, who had pulled down the old wall, were about to rebuild it further back from the street and place railings thereto, and also to place steps for approaches to the doors which were four feet above the level of the street. The boundary wall, railings, and steps were part of one and the same plan and design under which the chapel and house had been built.

On the 14th June, 1860, the plaintiffs were served with the following notice, under the hands and seal of the members of the Board:—
“We, the members of the Local Board of Holyhead, hereby give you notice that the contemplated steps from the entrance of the chapel to the street do not meet with the approbation of this Board; and we require such alterations to be made as shall not bring the lowest *step so near the centre of the street as the present con-
*603] templated arrangements would bring it.”

After some correspondence and negotiation between the parties, which failed, and after a resolution by the defendants that they would not consent to the proposed steps in front of the chapel, on the ground that they did not leave sufficient space for the highway, the plaintiffs, in July, 1861, erected their boundary wall and fence in a line with the railing in front of the adjoining property, and built two flights of steps to the doors of the building (within the boundary wall), all of them being built and put upon their own land, and leaving between two and three feet of their own land open for the widening of the street at one end; but the road was still only twenty-two feet wide by measuring from the plaintiffs' wall to the houses on the opposite side.

The defendants, on the 7th of September, 1861, after serving formal notice to the plaintiffs to remove them in fourteen days, caused the walls and fence to be thrown down, pursuant to a resolution of the

Board. The defendants refused to compensate the plaintiffs for the land they required them to give up to the street. They also refused to point out any Act of Parliament or other authority under which they acted; and they asserted their absolute right to acquire the strip of land in front of the plaintiffs' buildings for the use of the street without compensation.

The defendants drew up a set of by-laws, which were duly sanctioned and approved by the Secretary of State, before the steps were built by the plaintiffs.

The 33d by-law, "As to local width, &c., of new streets," was as follows:—

"XXXIII. The local Board shall by their order approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices *thereof; but if the owner or other person intending to construct any new street or [*604 erect any new building, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local Board, or if any owner or person shall construct or cause to be constructed any works, or do any act, or omit to do any act, or comply with any requirements of the local Board, or shall make any alteration in any works after they have been completed, whether in new or existing buildings, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*; and he shall pay a further sum, not exceeding 40*s.*, for each and every day which such works shall continue or remain contrary to the said provisions; and the local Board may, if they shall think fit, cause such works to be removed, altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act, 1848."

The Court is to be at liberty to draw inferences of fact as a jury.

The question for the opinion of the Court is, whether the defendants, under the circumstances, were justified in removing and throwing down the wall and fence of the plaintiffs. If the Court shall be of opinion in the negative, judgment is to be for the plaintiffs, with 20*l.* damages, and costs: if in the affirmative, judgment of non pros. is to be entered.

Mellish (*Crompton Hutton* with him), for the plaintiffs.—The defendants had no right to destroy the plaintiffs' wall and fence. They were not justified by the 33d by-law, for if it applies to this case it is void, for the local Board *had no power to make it. The 34th section (a) of the Local Government Act, 21 & 22 Vict. c. 98, [*605

(a) Sect. 34. "The fifty-third and seventy-second sections of the Public Health Act, 1848, shall be repealed; and in lieu thereof be it enacted as follows:—

"Every Local Board may make by-laws with respect to the following matters (that is to say):

"(1.) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof;

"(2.) With respect to the structure of walls of new buildings for securing stability and the prevention of fires;

"(3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings;

enables the local Board to make by-laws "with respect to the level, width, and construction of new streets." That cannot authorize a by-law empowering them to pull down any new works of which they may disapprove. [BRAMWELL, B.—The 34th section authorizes by-laws "as to the power of the local Board to remove, alter, or pull down *any work* begun or done in contravention of such by-laws."] That must mean by-laws which the Board had power to make. *606] *The 35th section(a) of the Act only applies to cases "where any *house or building* has been taken down in order to be rebuilt or altered," and in that case the local Board may prescribe the line in which it is to be thereafter built; and they are bound to pay compensation to the owner for any damage he may sustain in consequence of his house or building being set back. Here the local Board have not prescribed any line, and they have refused to make any compensation to the plaintiff.

The Court then called on

Manisty, for the defendants, who admitted that their acts were unjustifiable unless the 33d by-law was authorized by the 34th section of the Local Government Act, 1858.

POLLOCK, C. B.—We are all of opinion that this by-law is invalid. The local Board had no right to make a by-law investing themselves with power beyond that conferred on them by the Act. Our judgment will therefore be for the plaintiffs.

BRAMWELL, B., and CHANNELL, B., concurred.

Judgment for the plaintiffs.

"(4.) With respect to the drainage of buildings, to waterclosets, privies, ash-pits, and cess-pools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the Local Board, and as to the power of the Local Board to remove, alter, or pull down any work begun or done in contravention of such by-laws: Provided always, that no such by-law shall affect any building erected before the date of the constitution of the district:

"But for the purpose of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework shall be left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

(a) Sect. 35. "When any house or building has been taken down in order to be rebuilt or altered, the Local Board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith; and the Local Board shall pay or tender compensation to the owner or other person immediately interested in such house or building, for any loss or damage he may sustain in consequence of his house or building being set back; the amount of such compensation, in case of dispute, to be settled in the same manner as compensation for land, to be taken under the provisions of 'The Lands Clauses Consolidation Act, 1845,' is directed to be settled; and all provisions of the said last-mentioned Act relating to the purchase of lands shall apply to the payment made for such loss or damage as if it were a purchase under such Act."

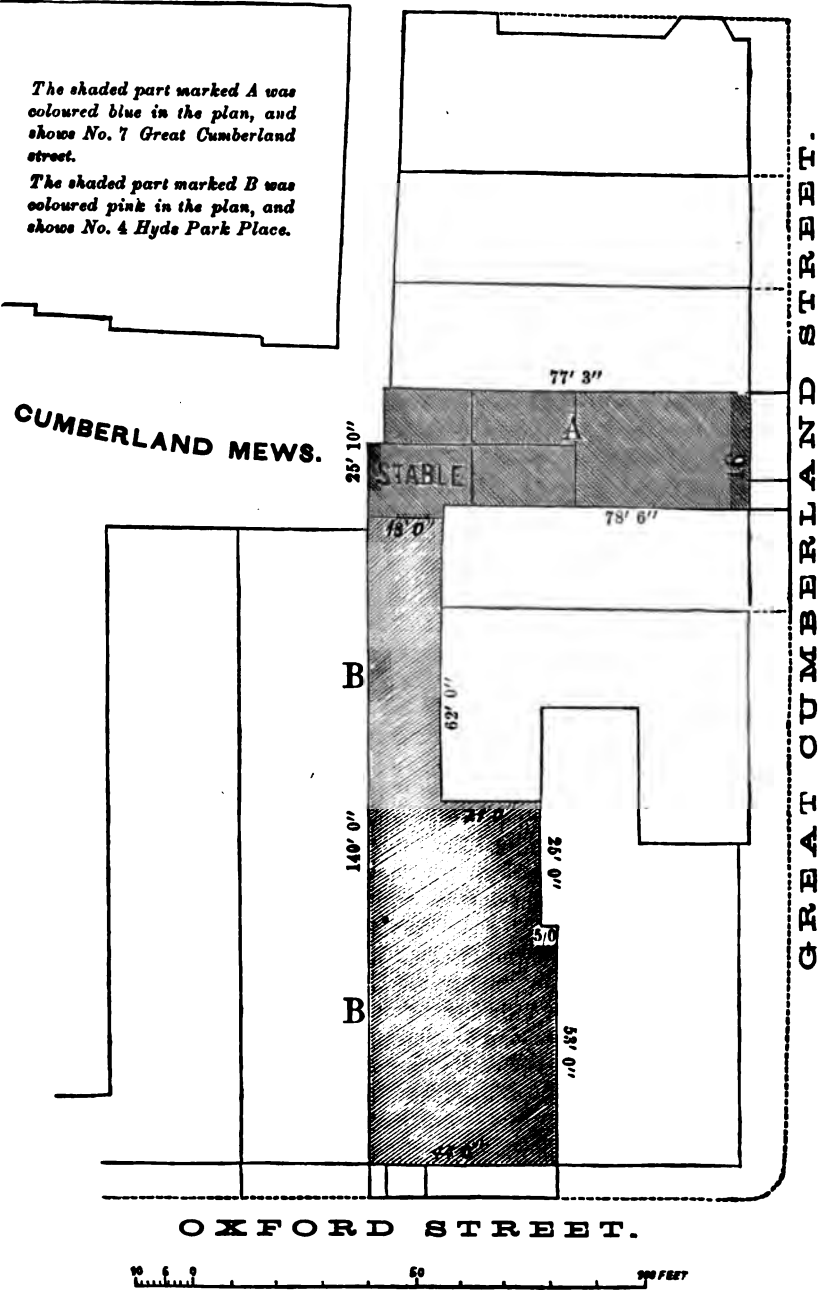
***MAITLAND and Others v. MACKINNON. Nov. 23. [*607**

In 1766, P., the owner in fee, demised to B. a plot of ground for ninety-seven years and a quarter from the 25th of December, 1765. The trustees of B. demised to S. for ninety-six years, from Lady Day, 1765, a part of the ground upon which a house, called No. 7, Cumberland Street, and a stable, were built; and they also demised to E. for eighty-nine years, from Lady Day 1771, another part of the ground upon which a house, called No. 4, Hyde Park Place, was built. In 1795 R., being the owner of the leases of both houses, assigned the lease of No. 7, Great Cumberland Street to G., reserving the stable, and from that period it was always occupied with No. 4, Hyde Park Place. In 1823 the defendant, who had acquired the interest of R. in the lease of No. 4, Hyde Park Place, and who was in actual occupation of it together with the stable (to which he had made a direct communication by a door from the house), obtained from the owner of the reversion of the plot of ground, demised in 1766, a reversionary lease of No. 4, Hyde Park Place, for ninety-nine years from the 25th of March, 1822. The house was described in this lease by metes and bounds and by reference to a plan in the margin, neither of which included the stable, but the lease contained the following words, which were not contained in the lease of the 23d of December, 1774:—"Together with all out-houses, edifices, buildings, stables, yards, gardens, ways, watercourses, lights, areas, vaults, cellars, easements, profits, and commodities whatsoever to the said premises hereby demised belonging or appertaining." There was also a covenant to deliver up at the end of the term "racks, mangers, stalls," &c. In 1840, the owner of the reversion of the plot of ground demised in 1766 granted to D. a reversionary lease of No. 7, Great Cumberland Street, for fifty years by the following description:—"Together with the capital messuage or tenement, coach-house and stable, erected and built thereon, &c., and which said messuage (but not the stable) is now in the possession of D.," and which said stable is now in the possession of M. (the defendant). On the expiration of the lease of the 23d of December, 1774, the plaintiff, to whom the reversionary lease of No. 7, Great Cumberland Street had been assigned, brought ejectment to recover possession of the stable.—Held, that the stable did not pass to the defendant under the general words in the reversionary lease of 1823, as "belonging or appertaining" to the demised premises.

EJECTMENT to recover possession of stables, situate at the back of a house, No. 7, Great Cumberland Street, Marylebone, in the county of Middlesex.

At the trial, before Martin, B., at the Middlesex Sittings after last Trinity Term, the following facts appeared.—By indenture of lease, dated the 15th April, 1766, H. Portman demised to W. Baker for a term of ninety-seven years and one quarter from the 25th of December, 1765, a plot of ground delineated on a plan in that lease, and upon which No. 7, Great Cumberland Street, with the stable in question, and No. 4, Hyde Park Place, were subsequently built. By indenture of underlease, dated the 25th August, 1774, the trustees of W. Baker, after his death, under the powers of a private Act of Parliament, demised the ground on which No. 7, Great Cumberland Street and the stable now stand to R. Sturt for ninety-six years from Lady Day, 1765. By indenture of underlease, dated the 23d December, 1774, the trustees of W. Baker demised the ground [*608 on which No. 4, Hyde Park Place now stands, to Elizabeth Palmer for eighty-nine years from Lady Day, 1771, by the description of "all that piece or parcel of ground situate, lying, and being on the north side of Oxford Street, in the parish of Marylebone, in the county of Middlesex, fronting south upon Oxford Street, north upon ground lately let to Robert Sturt," &c. After several intermediate assignments, the mortgagees of R. Sturt by indenture, dated the 2d May, 1794, assigned to Roger Palmer "all that piece or parcel of ground, messuage, or tenement and premises comprised in the said indenture of lease of the 25th August, 1774, and thereby demised, &c., together

UPPER BRYANSTONE STREET.



with the coach-house and stable erected and built on part of the said piece or parcel of ground, which was demised to the said Robert Sturt as aforesaid."

By indenture of the 22d August, 1786, Elizabeth Palmer assigned to Roger Palmer the lease of No. 4, Hyde Park Place. Roger Palmer having thus become the possessor both of the lease of No. 7, Great Cumberland Street, and No. 4, Hyde Park Place, by indenture, dated the 5th June, 1795, made between Roger Palmer of the one part and Thomas Glyn of the other part, reciting (*inter alia*) that T. Glyn had contracted with R. Palmer for the purchase of the said piece of ground, messuage or tenement, coach-house, cellar under the stable, and all other premises assigned to R. Palmer by the indenture of the 2d May, 1794, except the stable only: it was witnessed that R. Palmer assigned to T. Glyn, "All that the said piece or parcel of ground, messuage or tenement, coach-house, cellar under the stable, and all and singular other the premises, situate in Great Cumberland Street aforesaid, comprised in and demised by the said indenture of the 25th August, 1774: except nevertheless, and always reserved out of the [*609 *said assignment, the stable then in the possession of the said R. Palmer, standing and being on part of the premises demised by the said lease:" habendum, for the residue of the said term of ninety-six years. From that period to the present time the stable had always been occupied with No. 4, Hyde Park Place; and for some time past the only entrance to it has been from these premises, a direct communication having been made by a door.

The defendant became possessed of the lease of No. 4, Hyde Park Place in right of his wife, to whom Roger Palmer devised it, and he resided there and occupied the stable.

By indenture, dated the 18th August, 1823, the trustees of Lord Portman (the owner in fee of the reversion) granted to the defendant a reversionary lease of No. 4, Hyde Park Place, for ninety-nine years from the 25th March, 1822, by the following description:—"All that piece or parcel of ground situate, lying, and being in Hyde Park Place, lately called Oxford Street, and being at the western extremity of Oxford Street on the north side thereof, in the parish, &c., fronting south upon Oxford Street aforesaid, and abutting east upon the corner house in Great Cumberland Street, belonging to Lord Bagot, north upon Cumberland Mews, and west upon a messuage or tenement and premises formerly leased to Edmund Rush, but now occupied by the Duchess of Marlborough, containing in width from east to west on the south end or front thereof forty-four feet, and in depth on the west side 140 feet, and running from the south-east corner northwards fifty-three feet, then running westwards five feet, then running northwards again twenty-five feet, then running westwards again twenty-one feet, then running northwards again sixty-two feet, and then running westwards again eighteen feet, be the same several dimensions, or any of them, of a size little more or less; the ground plot *whereof is more particularly described in the plan(a) [*610 drawn in the margin of these presents: together with the double brick messuage or tenement erected and built thereon, being the first house westwards from Great Cumberland Street and next the

(a) The plan did not include the stable in question.

corner house, and No. 4 in Hyde Park Place, but lately called 246 in Oxford Street; all which said premises hereby demised are now subject to a lease which, by a certain indenture bearing date the 15th day of April, 1766, and made or expressed to be made between H. Portman of the one part and W. Baker of the other part, was granted for a term of ninety-seven years and one quarter of another year, commencing from Christmas day, 1765: together with all out-houses, edifices, buildings, stables, yards, gardens, ways, watercourses, lights, areas, vaults, cellars, easements, profits, and commodities whatsoever to the said premises hereby demised belonging or appertaining." The lease contained a covenant by the defendant, at the expiration of the term, to yield up the premises, together with (inter alia) "racks and mangers."

After several mesne assignments, by indenture dated the 15th May, 1830, the lease of No. 7 Great Cumberland Street was assigned to Bonamy Dobree, excepting the stable. By indenture of the 16th May, 1840, a reversionary lease of No. 7, Great Cumberland Street, was granted to Bonamy Dobree for fifty years from the 25th March, 1839, by the following description:—"All that piece or parcel of ground situate, lying, and being on the west side of Great Cumberland Street, in the parish, &c.; fronting east on Great Cumberland Street aforesaid, and abutting north on a messuage or tenement formerly leased to Mr. Langley, but now in the occupation of

Palmer, south upon another messuage or tenement formerly leased to J. Chessman and now in the occupation of Scott, *611] and west on premises in *Cumberland Mews, formerly let to E. Rush: Together with the capital messuage or tenement, coach-house and stables erected and built thereon, &c., and which said messuage (but not the stables) is now in the possession of the said Bonamy Dobree; and which stables are now in the possession or occupation of W. Mackinnon or his under-tenants; the dimensions of which said piece or parcel of ground and premises are more fully set forth and described in the plan(a) or ground plot thereof drawn in the margin of these presents: all which said premises hereinbefore demised, or intended so to be, are subject to an indenture of lease bearing date the 15th day of April, 1766, and made or expressed to be made between H. Portman of the one part and W. Baker of the other part, whereby the said premises were demised for a term of ninety-seven years and one quarter of another year commencing from Christmas 1765." After several mesne assignments the reversionary lease of the 16th May, 1840, was assigned to the plaintiff.—Under the stable there was a cellar which belonged to No. 7, Great Cumberland Street.

On the expiration of the underlease of the 25th August, 1774, the plaintiff required the defendant to give up possession of the stable, which he refused to do, on the ground that it passed to him under the general words in the reversionary lease of the 18th August, 1823.

Upon these facts the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Montague Smith, in the present Term, obtained a rule nisi accord-

(a) The stable was shown in this plan.

ingly, on the ground that the stable passed to the defendant under the lease of the 18th August, 1823; against which

Mellish (Garth with him) showed cause (Nov. 21).—*The [*612 stable did not pass to the defendant under the lease of the 18th August, 1823. The demised premises are described by metes and bounds, and by reference to a plan in the margin of the lease which excludes the stable. Then follow the words "together with all out-houses, edifices, buildings, stables, yards, &c., to the said premises hereby demised belonging or appertaining." But where the demised premises are described by metes and bounds, no more will pass under any general words than is contained in the particular description: *Doe d. Meyrick v. Meyrick*, 2 C. & J. 223.† Moreover the stable cannot be said to belong or appertain to the demised premises, for one piece of land cannot properly appertain to another.—He also argued that the stable would not pass because it was not mentioned in the memorial registered under the 7 Anne, c. 20, s. 5.

Montague Smith and *Maude*, in support of the rule.—The stable passed under the lease of the 18th August, 1823. In the year 1795, the owner of the leases of both houses assigned that of No. 7, Great Cumberland Street, reserving to himself the stable; and thenceforth, up to the time when the lease of the 18th August, 1823, was granted the stable had been occupied with No. 4, Hyde Park Place. The general words in that lease are therefore apt words to pass the stable. The words "belonging or appertaining" are equivalent to "occupied with or enjoyed." No doubt, land cannot be "appurtenant" to a messuage in the strict sense of the term, but, in order to give effect to the intention of the parties, the word "appurtenant" may be read in the sense of "usually held, used, occupied, or enjoyed therewith:" *Hill v. Grange*, Plow. 170; *Morris v. Edgington*, 3 Taunt. 24; *James v. Plant*, 4 A. & E. 749 (E. C. L. R. vol. 31); 1 Shep. Touch. *94. In *Ongley v. Chambers*, 1 Bing. 483 (E. C. L. R. vol. 8), Lord [*613 Gifford, in delivering the judgment of the Court, said:—"In Cro. Eliz. 16, Anderson, J., says, 'That land shall pass as pertaining to a house which has been occupied with it by the space of ten or twelve years, for by that time it hath gained the name of parcel or belonging, and shall pass with the house by that name in a will or leases.'" *Doe d. Norton v. Webster*, 12 A. & E. 412 (E. C. L. R. vol. 40), is also an authority that land occupied with a messuage may pass under a grant of the messuage "with the appurtenances." Again, in *Doe d. Gore v. Langton*, 2 B. & Adol. 680 (E. C. L. R. vol. 22), the words "thereunto belonging" were construed in their popular sense. In *Doe d. Meyrick v. Meyrick*, 2 C. & J. 223,† there was a particular enumeration of the closes intended to be passed, which confined the operation of the general words. Here the covenant to surrender, at the end of the term, the "racks and mangers," shows that the stable was intended to pass. Assuming that the language of the lease is ambiguous, the continuous user of the stable with No. 4, Hyde Park Place, raises the presumption that it was intended to pass, notwithstanding the plan in the margin of the lease excludes it: *Simpson v. Dendy*, 8 C. B. N. S. 433 (E. C. L. R. vol. 98); *Berridge v. Ward*, 10 C. B. N. S. 400 (E. C. L. R. vol. 100). *Our. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case the plaintiff is entitled to our judgment unless the stable passed under the reversionary lease of August, 1823. We are of opinion that it does not. There is in it a precise and most particular description by metes and bounds of certain premises to be demised, which do not include the stable in question. It *614] *may be that something would pass, though not within the boundary set out, if necessarily a part of the premises, as for instance a front area might so pass. But the stable in question would not pass on that principle, because undoubtedly it is not necessarily a part of the dwelling-house and land described. Accordingly the counsel for the defendant did not contend for this, but urged that the stable passed under the subsequent words describing all "out-houses," &c., "stables," &c., "belonging to the premises." Now every one knows that these and similar words are inserted in leases without reference to any particular subjects to which they may be applicable, as indeed appears in this case, for, among other things, "watercourses" are mentioned, there being no watercourse connected with the premises. Still there may be *cases* in which something would pass by these words, and therefore it is necessary to see whether in *this* case the stable does pass. The words relied on are "stables belonging." But if the premises themselves are examined, it is difficult to say the stable "belongs" to the house in Hyde Park Place. Adding it to that house makes the outline of both premises irregular, obviously cuts a piece from the Cumberland Place plot, and adds it to the plot in Hyde Park Place. Then the cellars under the stable belong to No. 7, Great Cumberland Street, and there was a door from thence to the stable. If the history of the premises is examined, it is certain that originally the ground on which the stable stands "belonged" to No. 7, Great Cumberland Street, and that if the lease of that house were forfeited, with it would be forfeited the stable. It comes to this, that, notwithstanding these considerations, the stable must be said to "belong" to the house No. 4, Hyde Park Place, because it has been used with it for (no doubt) a vast number of years, with no open communication with any other premises. It seems to us that these *615] words, which are not words of art, do not include *these stables,—that any person knowing the facts would say, "the stable belongs to No. 7, Great Cumberland Street, though it has been used with No. 4, Hyde Park Place."

In the argument it was much relied upon by defendant's counsel that there is a covenant to give up "racks" and "mangers," but the mention of stables in the lease would of course lead to a covenant to give up racks and mangers; and if the one did not cause the stable to pass, so neither in our judgment would the other. The case may appear to be hard upon the defendant, who no doubt intended to renew his lease of all that he actually occupied; but it seems to have escaped the attention of those who prepared the lease that the defendant held his house and premises, No. 4, Hyde Park Place, under one title, and the stable in question under another; and the lease in its present form does not operate on both.

Judgment for the plaintiff.

PARR and Another v. LILICRAP. Nov. 24.

Where a defendant pays money into Court, which the plaintiff accepts in satisfaction of his claim, he "recovers" the amount within the meaning of the 13 & 14 Vict. c. 61, s. 11, which, in certain cases, deprives a plaintiff of costs if he "shall recover a sum not exceeding 20*l*."

THIS was an action to recover 12*l* 5*s*. 6*d*. for goods sold and delivered. The defendant pleaded to the whole declaration payment into Court of 12*l* 5*s*. 6*d*. The plaintiffs replied by accepting the sum paid into Court in full satisfaction and discharge of the causes of action in the declaration mentioned. The Master taxed the plaintiffs' costs at 4*l* 7*s*., whereupon the defendant obtained a summons at Chambers to review the taxation by disallowing the whole of the items comprised in the plaintiffs' bill of costs. The summons was heard before Martin, B., who made an order accordingly.

Gadsden now moved to rescind the order.—The 13 & 14 Vict. c. 61, s. 11, deprives a plaintiff of costs in actions of *covenant, [*616 debt, detinue, or assumpsit, if he "shall recover a sum not exceeding 20*l*." Here the amount paid into Court was not "recovered" within the meaning of that enactment. The word "recover" has been judicially interpreted to mean a recovery by judgment of the Court: *Brooks v. Rigby*, 2 A. & E. 21 (E. C. L. R. vol. 29). In 15 Jurist, part 2, p. 242, it is stated that, in a case of *Power v. Jones, Platt, B.*, decided at Chambers that a plaintiff is not deprived of his costs where money is paid into Court. In *Chambers v. Wiles*, 24 L. J., Q. B. 267, *Coleridge, J.*, decided, in accordance with the opinion of four of the Judges who had considered the point, that the taking money out of Court was not a "recovery" within the meaning of the 13 & 14 Vict. c. 61, s. 11. [MARTIN, B.—If the plaintiff does not recover the money, how does he get it?] The 11th section of the 13 & 14 Vict. c. 61, contemplates a recovery by judgment, for it goes on to say, "the plaintiff shall have judgment to recover such sum only, and no costs." This is a voluntary payment on the part of the defendant. [MARTIN, B., referred to *Dunston v. Paterson*, 5 C. B. N. S. 279 (E. C. L. R. vol. 94.)] Formerly a plaintiff was not deprived of his costs in the case of a judgment by default, but that is altered by the 19 & 20 Vict. c. 108, s. 30; and if the legislature had intended that a plaintiff should have no costs where money is paid into Court, there would have been a similar enactment. [POLLOCK, C. B., referred to the 73d section of the Common Law Procedure Act, 1852.] That section enables the plaintiff to sign judgment for his costs; but there is no judgment in respect of the debt. [BRAMWELL, B.—If the language of the statute had been that a plaintiff shall have no costs when he "shall not recover a sum exceeding 20*l*," there could have been no doubt. You draw a distinction between that and "shall recover a sum not exceeding 20*l*."] The latter part of the 11th section shows that the word "recover" has reference to a recovery by judgment. [MARTIN, B., referred to *Robertson v. Sterne*, [*617 13 C. B. N. S. 248.] That was the case of a compulsory reference under the Common Law Procedure Act, 1854, which gives to the award the effect of a judgment. [BRAMWELL, B.—Suppose an action

is brought for 25*l.*, and the defendant pays into Court 15*l.*, and the plaintiff goes to trial and recovers 10*l.* more, according to your argument he would not have "*recovered*" 25*l.*, but 10*l.* only, and therefore would not be entitled to any costs.] In that case there would be a judgment for 25*l.*

Rochfort Clarke appeared to show cause in the first instance, but was not called upon to argue.

POLLOCK, C. B.—The case put by my brother Bramwell shows what is the meaning of the word "*recover*," in the 13 & 14 Vict. c. 61, s. 11. It does not mean "*recover*" by verdict or judgment, but "*obtain*" by means of the suit. There ought to be no distinction between the case where a defendant pays money into Court, which is accepted by the plaintiff in satisfaction of his claim, and where the plaintiff goes on to trial and still recovers less than 20*l.* If a defendant paid 10*l.* into Court, and the plaintiff recovered by verdict only 5*l.* more, it is admitted that he would not be entitled to costs; whereas it is said that if a defendant paid 15*l.* into Court, and the plaintiff accepted it in satisfaction of his claim, he would get his costs. What reason can there be for such a distinction? In each case it would appear by the record that the sum which the plaintiff obtained by the suit was less than 20*l.* It seems to me, therefore, that if a sum not exceeding 20*l.* is paid into Court, and the plaintiff accepts it in satisfaction of his claim, as that is what he was suing for, he ought not to have any costs.

*618] I should add, that we are deciding in accordance with the opinion of the Court of Common Pleas in *Robertson v. Sterne*, 13 C. B. N. S. 248, which is at variance with that of Coleridge, J., in *Chambers v. Wiles*, 24 L. J., Q. B. 267; but the former case was decided after full argument and upon consideration, while the latter was the decision of a single Judge in refusing a rule nisi. Therefore, upon authority as well as upon the construction of the Act, this rule must be refused.

MARTIN, B.—I am of the same opinion. The question turns upon the meaning of the words "*shall recover in any action*," in the 11th section of the 13 & 14 Vict. c. 61. It seems to me, that if a man brings an action and declares, and the defendant pleads payment of money into Court, and the plaintiff takes it out of Court, he "*recovers*" it in that action; for he obtains by means of that action money which he could not obtain without it. That seems to me the good sense and reason of the matter. The only objection arises from the words "*the plaintiff shall have judgment to recover such sum only*," and if that meant a judgment in the strict sense of the term there might be a difficulty; but in my opinion that is not the true meaning. It seems to me that the meaning is this:—If in consequence of an action a plaintiff shall recover a sum not exceeding 20*l.*, he shall have no costs. Where the money is obtained by means of an action, the legislature has thought fit to deprive a plaintiff of costs if the cause is within the jurisdiction of a County Court, and he might have sued in that tribunal. Originally there was an exception with respect to judgments by default, but a subsequent Act, 19 & 20 Vict. c. 108, s. 80, has abolished that distinction. Again, it was supposed that a plaintiff who recovered by the award of an arbitrator upon a compul-

sory reference under the Common *Law Procedure Act, 1854, a sum not exceeding 20*l.*, was entitled to his costs; but the case of *Robertson v. Sterne*, 13 C. B. N. S. 248, decided that a plaintiff succeeding upon such a reference equally recovers the amount awarded as if he had obtained it by the verdict of a jury. That case is an authority that, where a person brings an action in a superior Court under circumstances which disentitle him to costs, the enactment which deprives him of them extends to every mode by which he obtains the money sought to be recovered by that action.

BRAMWELL, B.—I am also of opinion that a rule ought not to be granted. Independently of authority, I see no reason for any difference between the case where money is paid into Court and where the plaintiff goes to trial and recovers it. In each case he obtains the money by means of the action. A plaintiff loses his costs where he recovers by verdict, or obtains judgment on demurrer, or where there is a judgment by default, and why should he be entitled to costs when money is paid into Court? In *Chambers v. Wiles*, 24 L. J. Q. B. 267, Coleridge, J., said:—"The law which has extended the jurisdiction of the County Court left it open to a party, if the sum was above 20*l.*, to sue in the superior Court. That right ought not to be construed invidiously. If a party, taking advantage of the law as it stands, sues for a sum just over 20*l.*, and the defendant pays into Court 19*l.* 19*s.*, it would be a wrong thing for the plaintiff to go on and put himself and the other party to the expense of a trial; and yet he would be compelled to do it, in order to get his costs, if the objection on the part of the present defendant was held to be well founded." Precisely the same argument might be used with respect to a judgment by default. It is said that the statute does not apply, because the plaintiff has not "recovered" a sum not *exceeding 20*l.*, but that is not so. Formerly there could be no "recovery" without a judgment, for at common law every case was determined by a judgment of some kind. But now a new method has been introduced, by which a plaintiff may obtain the money which he sues for without a judgment, and I cannot see why the money so obtained is not "recovered" by the action. It is said that this is a voluntary payment, but it is only voluntary in the sense that the money is paid to avoid the expense of further proceedings to compel payment. It might as well be said that a payment after judgment is voluntary, because a defendant pays the money to avoid an execution. The payment is enforced by means of the action, and therefore there is a "recovery" of the amount in the action.

CHANNELL, B.—I am also of opinion that there ought to be no rule. I have come to that conclusion upon the words of the Act, independently of authority. Though our decision is opposed to that of Coleridge, J., in *Chambers v. Wiles*, it is in accordance with that of the Court of Common Pleas in *Robertson v. Sterne*.

Rule refused.(a)

(a) This decision was adopted by the Court of Queen's Bench in *Boulding v. Tyler*, Hil. T. 1863.

*621] *WALKER v. OLDING and Others. Nov. 25.

An execution-creditor is not liable to the person whose goods have been wrongfully taken in execution for any damage sustained by him in consequence of their sale under an interpleader order.

CASE stated by an arbitrator for the opinion of this Court, as follows:—

1. The plaintiff, in the first count of the declaration, complained of a trespass by the defendants in breaking and entering a dwelling-house, wharf, &c., and premises of the plaintiff at Millwall, in the parish of Poplar and county of Middlesex, and seizing, taking, and carrying away certain timber, wood, &c., household furniture, fixtures, goods, and effects of the plaintiff, with an allegation that the plaintiff was thereby prevented from carrying on his trade and business of a timber merchant, and lost all the profits he would have made by the sale of the said timber, wood, &c., and was injured in his said business, and was put to expense in endeavouring to obtain possession of the said goods and premises and to establish his right thereto.

The declaration contained a second count in trover, for the conversion by the defendants to their own use of goods of the same description and quality as those mentioned in the first count, alleging that the plaintiff sustained thereby similar damages to those in the first count mentioned.

2. To this declaration the defendants pleaded:—First, not guilty.—Secondly, to so much of the first count as alleged trespasses to the realty: A denial that the said premises were the plaintiff's property.—Thirdly, to so much of the first count as alleged trespasses to the said goods and effects: A denial that the said goods and effects were the plaintiff's.—Fourthly, to the second count: A denial that the goods therein mentioned were the goods of the plaintiff.

3. The plaintiff is a timber merchant.

*622] *4. The defendants carry on business in partnership as bankers in Clement's Lane in the city of London.

5. The trespasses and conversion for which the action is brought, and in respect of which the said verdict was entered, are the entry by the sheriff of Middlesex upon the premises of the plaintiff for the purpose of executing the writ of fieri facias hereinafter mentioned; and the seizure and sale of the furniture, stock in trade, plant, and effects of the plaintiff as hereinafter described.

6. At the time of the issuing of the said writ of fieri facias and of the delivery thereof to the sheriff as hereinafter mentioned, the plaintiff was tenant and occupier of a dwelling-house and of a timber yard, wharf, and premises at Millwall, Poplar, in the county of Middlesex, known as the Regent's Wharf, where he was then carrying on his said business of a timber merchant.

7. The plaintiff was also at the time of the said seizure the owner of the household furniture (then constituting the furniture of the said dwelling-house) and of the stock in trade, plant, fixtures, and effects seized and taken as hereinafter mentioned under the said execution.

8. The plaintiff had become the owner of the said furniture, stock in trade, plant, fixtures, and effects on the 1st June, 1861, by the

purchase thereof from one John Eades, to whom the same then belonged, and who had previously occupied the said dwelling-house, yard, wharf, and premises, and had carried on there the business of a timber merchant.

9. The plaintiff bought the said furniture for the sum of 305*l.*, and the said stock in trade, plant, and other effects for the sum of 466*l.* 6*s.*, and gave bills of exchange for the said several sums, which were afterwards duly paid by him.

10. The plaintiff also on the said 1st June, 1861, became tenant of the said dwelling-house, yard, wharf, and premises to the said John Eades at the monthly rent of 20*l.*, and thereupon, on or about the 8th June, 1861, took possession *of the said wharf and premises, [*623 and entered upon his said business there, and removed with his family into and took possession of the said dwelling-house and furniture.

11. The said John Eades, whilst the said wharf and premises were occupied by him, before the said sale to the plaintiff, had, on the 2d January, 1861, been compelled to stop payment, being then indebted, among others, to the defendants, in the sum of 308*l.* 16*s.* 8*d.*, on a dishonoured bill of exchange of which the said John Eades was the drawer, and which had been discounted by the defendants.

12. After his said stoppage a meeting of his creditors was called by the said John Eades, and a composition of 6*s.* 8*d.* in the pound, payable by bills of exchange at two, four, and six months, upon his said debt, was offered by him to his creditors, the majority of whom agreed to receive the same in satisfaction of their several claims.

13. The defendants declined to accept the said composition, and on the 29th May, 1861, commenced an action against the said John Eades, in the Court of Common Pleas, under the Bills of Exchange Act, for the recovery of their said debt, and on the 14th June, 1861, obtained a judgment in the said action for the sum of 313*l.* 8*s.* 3*d.*

14. After the commencement of the said action the following notice, on behalf of the plaintiff in this action, was, on the 8th June, 1861, served on the sheriff of Middlesex, and on the defendants and their attorney:—

“To the sheriff of Middlesex;

“Messrs. Olding, Sharpe and Company,
and

“Mr. Algernon Wells, their Attorney.

“We hereby give you notice, that the premises known as Regent's Wharf, Millwall, Poplar, in the county of Middlesex, and all the stock in trade, furniture, and other effects there, belong to Mr. William Walker.

*“If, after this notice, you enter upon the said premises you [*624 will be treated as trespassers and proceeded against accordingly.

“Dated this 8th June, 1861.

“TAYLOR and JAQUET,

“15, South Street, Finsbury Square,

“Attorneys for the said William Walker.”

15. On the 14th June, 1861, a writ of fieri facias was sued out by the present defendants upon the said judgment against the said John Eades, and the said writ was on the same day delivered to the sheriff

of Middlesex, endorsed with a direction as follows :—" Levy 313*l.* 8*s.* 3*d.* and 1*l.* 10*s.* for costs of execution, &c., and also interest on 313*l.* 8*s.* 3*d.* at 4*l.* per cent. per annum from the 14th day of June, 1861, until payment, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses. The defendant is a timber merchant and resides at Regent's Wharf, Millwall, in your bailiwick."

16. Under the said writ of fieri facias, the sheriff of Middlesex, on the 15th June, 1861, entered upon the said dwelling-house, wharf, and premises of the plaintiff, and levied upon the whole of the said furniture, stock in trade, plant, and effects then being thereon, and which had been purchased by the plaintiff as aforesaid from the said John Eades.

17. On the 17th June, 1861, the following notice, on behalf of the plaintiff in this action, was served on the said sheriff, and on the defendants and their attorney, by Messrs. Taylor and Jaquet, as attorneys for the plaintiff.

"To the sheriff of Middlesex and his officers;

"Messrs. Olding, Sharpe and Company,
and

"Mr. Algernon Wells, their Attorney.

*625] "Notwithstanding our notice to you of the 8th of June *instant, we find that you have caused a levy to be made upon the premises known as Regent's Wharf, Millwall, Poplar, under and by virtue of a writ of fieri facias in a cause of 'Olding and others against Eades :—

"The premises and property are claimed by and belong to our client Mr. William Walker, and we shall forthwith commence an action of trespass against you to recover damages for your illegal entry upon our client's premises.

"Dated this 17th day of June, 1861.

"Yours, &c.

"TAYLOR and JAQUET,

"15, South Street, Finsbury Square."

18. An interpleader summons was thereupon taken out by the said sheriff, upon which, on the 21st June, 1861, the following order was made by Mr. Justice Williams :—

Olding and Others *v.* Eades.

"Upon hearing the attorneys or agents for the sheriff of Middlesex and for the plaintiff and for William Walker the claimant, and upon reading the affidavit of William Walker, I do order, that upon payment of the sum of 350*l.* into Court by the said claimant within a week from this date, or upon his giving within the same time security to the satisfaction of one of the Masters for the payment of the same amount by the said claimant, according to the directions of any rule of Court or Judge's order to be made herein, and upon payment to the said sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of fieri facias issued herein.

"And I do further order, that unless such payment shall be made or such security be given within the time aforesaid, the said sheriff do proceed to sell the said goods and chattels and pay the proceeds of the

sale, after deducting the *expenses thereof and the possession money from this date, into Court in the cause to abide further order herein. [*626

"And I do further order, that the parties do proceed to the trial of an issue in the Court of Common Pleas, in which the said claimant shall be the plaintiff and the said execution-creditor shall be defendant; and that the question to be tried shall be whether, at the time of seizure by the sheriff, the goods, &c., were the property of the claimant as against the execution-creditor.

"And I do further order, that such issue shall be prepared and delivered by the plaintiff therein within five days from this date and be returned by the defendant therein within three days, and shall be tried at the next assizes for the county of Surrey.

"And I reserve the question of costs and all further questions until after the trial of the said issue; and I further order, that no action shall be brought against the said sheriff for the seizure of the said goods."

19. The plaintiff (the claimant mentioned in the said order) did not, within the time in the said order mentioned, either pay the said sum of 350*l.* into Court or give security for the same, and the sheriff of Middlesex thereupon, on the 3d and 9th days of July, 1861, proceeded under the said order to sell the said furniture, stock in trade, plant, and effects, which realized, after deducting expenses and possession money, the sum of 325*l.* 15*s.* 8*d.*

20. The sheriff withdrew from the said premises on the 18th July, 1861.

21. On the 15th August, 1861, the sheriff paid into Court the said sum of 325*l.* 15*s.* 3*d.*

22. An issue was prepared in the form directed by the said interpleader order between the plaintiff (the claimant in the said order mentioned) and the present defendants, *which was tried at the assizes held in and for the county of Surrey on the August, 1861, when a verdict was found for the claimant, the plaintiff in this action. [*627

23. After the trial of the said issue the following order was, on the 7th November, 1861, made by Mr. Justice Williams:—

"Olding and Others v. Eades.

"Upon hearing the attorneys or agents, I do order that the sum of 325*l.* 15*s.* 3*d.* paid into Court in this cause by the sheriff of Middlesex, on 16th August, 1861, be paid out of Court to Mr. J. H. Taylor, the attorney for William Walker, the claimant; and that the defendants do pay to the said Mr. J. H. Taylor the costs of and occasioned to the claimant by the claim and of the sale and possession money under the interpleader order, and of the issue thereby directed to be tried, and of this application, to be respectively taxed."

"E. V. WILLIAMS."

24. In pursuance of the last-mentioned order the said sum of 325*l.* was afterwards paid out of Court to the plaintiff, and the costs mentioned in the said order were also taxed and paid by the defendants to the plaintiff.

25. I find and assess the damages actually sustained by the plaintiff by reason of the execution in manner aforesaid of the said writ of

feri facias, and of the said entry, seizure, possession, and sale thereunder by the said sheriff, at the sum of 411*l.*, of which amount I find and award that the damages sustained by the plaintiff up to and at the date of the said interpleader order were the sum of 50*l.*

26. The defendants contend that the plaintiff is not legally entitled to recover any portion of the said damages which accrued subsequent to the date of the said interpleader order.

27. The plaintiff, on the other hand, contends that he is legally entitled to the entire amount of the said damages.

*628] 28. The pleadings in this action are to form part of this case.

29. The question for the opinion of the Court is, whether the plaintiff is entitled to the whole of the said damages found by me to have been actually sustained by the plaintiff, or only to the damages sustained by him up to the date of the said interpleader order.

30. I award and direct that the verdict shall be amended and entered in accordance with the judgment of the Court upon the said question.

J. Brown (*Hawkins* with him) argued for the plaintiff (Nov. 17 and 19).—The plaintiff is entitled to the whole of the damages claimed. If there had been no interpleader, it is clear that the plaintiff would have been entitled to recover whatever damage he sustained by the wrongful seizure and sale of his goods. The defendants contend that the effect of the interpleader order is to deprive the plaintiff of all damages which accrued subsequently to the date of the order; but, of that were so, an interpleader order by which goods wrongfully seized were directed to be sold, would operate as an absolute protection against any liability for damage occasioned by their sale. An interpleader order has no such effect. At the time it is made the rights of the claimant and execution-creditor are in dubio, and the order merely directs what is to be done with the goods until those rights are ascertained. The order is made for the protection of the sheriff, not to exempt the execution-creditor from liability if it shall turn out that he has wrongfully seized the claimant's goods. [BRAMWELL, B.—Suppose the action had been brought against the sheriff, to what damages would he have been liable?] It is clear that he would not be liable to any damage subsequent to the interpleader *629] order, for the express object of the 1 & 2 Wm. 4, c. 58, s. 6, *is to afford relief and protection to sheriffs and their officers. But if the effect of an interpleader order is to deprive the claimant of a portion of his damages, great injustice would be done, for the bulk of the damage may arise from a forced sale of the goods in pursuance of the order. Even if the Judge had power to control the rights of the parties against each other, he has not by this order exercised it: *Mercer v. Stanbury*, 2 H. & N. 155, note,† *Beswick v. Boffey*, 9 Exch. 315.†

Lush (*Dixon* with him), for the defendants.—No person is responsible in damages for what is done in obedience to the order of a Court of competent jurisdiction. [POLLOCK, C. B.—That is not universally true. Persons are liable for maliciously putting the law in motion. No doubt, in criminal cases, if they act *bonâ fide*, they are excused, though mistaken; but that is on public grounds, and can scarcely

apply to a case like this where the parties act for their own advantage. CHANNELL, B.—No action will lie to recover damages which have been caused by the delay of a Court; but it is too broad a proposition to say that no one is responsible for anything done in obedience to the order of a Court.] If a person causes another to be brought before a magistrate on an unfounded criminal charge, and the magistrate remands him, he can recover no damages for his imprisonment subsequent to the remand, because that was the judicial act of the magistrate: *Brown v. Chapman*, 6 C. B. 365 (E. C. L. R. vol. 60). Suppose the execution-creditor had established his right to the goods, could he have recovered damages against the claimant for the delay of his execution by the interpleader order? An interpleader is for the protection of the execution-creditor as well as the sheriff. In *Carpenter v. Pearce*, 27 L. J., Exch. 143, this Court held that a Judge at *Chambers had authority to restrain an action against the exe- [*630 cution-creditor as well as against the sheriff. It is clear that the sheriff is not responsible for selling the goods under an interpleader order: *Abbott v. Richards*, 15 M. & W. 194.† So, here, the defendants have no answer to the action, but the plaintiff cannot recover any damage subsequent to the interpleader order. The plaintiff has in fact brought the damage upon himself, for he might either have consented to the sheriff remaining in possession, or he might have paid the amount levied into Court, or have given security for its payment.

J. Brown, in reply.—The Interpleader Act recognises a distinction between the execution-creditor and the sheriff. An execution-creditor is not responsible for the act of the sheriff in seizing and selling the wrong person's goods unless he directed it: *Wilson v. Tummon*, 6 Scott N. R. 894. But a sheriff may maintain an action against an execution-creditor for directing him to make such a seizure and sale: *Humphrys v. Pratt*, 5 Bligh. N. S. 154. If the effect of an interpleader order is to deprive the claimant of the damages which he would be entitled to recover had there been no interpleader, the practice should be altered and the rights of the claimant reserved by the order. As a general rule, a person who puts the law in motion is responsible for the damage thereby caused to another. *Lock v. Ashton*, 12 Q. B. 871 (E. C. L. R. vol. 64), merely decided that the defendant was not liable in trespass for a remand, which was the judicial act of the magistrate. An interpleader order is not a judicial act, but a mere direction to the sheriff in what manner he is to dispose of the goods until the disputed claim is determined. A sale under the order is a continuation of the original trespass: 1 Chit. Plead. 207, *7th ed., *Lowth v. Smith*, 12 M. & W. 582,† 1 Wms. Saund. 24, n. (1).—He also referred to Daniel's Chan- [*631 cery Practice, pp. 1611, 1043, 2d ed.

Our. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—We think the plaintiff is entitled to damages only up to the time of the interpleader order. The verdict establishes that the defendants are trespassers and wrongdoers as stated in the declaration, and the only question is, what is the damage caused to the plaintiff by the trespasses and wrongful acts so established?

Now, up to the time of the interpleader order, all the damage sustained by the plaintiff is caused by the defendants, for they certainly

are caused by the acts of the sheriff, viz., in taking and detaining, and those acts are the acts of the defendants, who, up to that time, are, with the sheriff, joint trespassers and wrongdoers. But, on the making of the interpleader order, the case is different. That order, and what is done under it, are the consequence of the claim of the plaintiff, the interpleader summons of the sheriff, and the decision of the Judge thereon. In this case the common order was made, and very often it is made with the consent or at the solicitation of the execution-creditor. But it may be otherwise. The execution-creditor may join the claimant in praying that the goods may not be sold, but that the sheriff may retain possession, and yet the Judge, at the sheriff's instance, may order a sale. So the claimant may prefer a sale, though the sheriff is willing to keep possession. How, then, can the Judge's order, and what is done under it, be said to be the act of the execution-creditor, or so direct a consequence of any *act that he is liable *632] for it? No doubt that order would not have been made but for the seizure of the goods by the defendants, but still it is a remote and not a proximate consequence of it, and therefore the defendants are not liable for it. No doubt this is hard on the plaintiff, but as between him and the execution-creditor the same hardship would exist if the latter had not directed the seizure of the goods, but merely contested the plaintiff's claim on the hearing of the interpleader summons. For there would then be no way of making him liable to these damages, nor indeed ought he to be. He would not in that case have ordered the seizure of the goods; he would have been brought before the Judge, not by his own act, but by that of the sheriff; he would have affirmed nothing, done nothing, but merely have refused to admit the plaintiff's claim, and then would have been subject to the order to interplead. And an execution-creditor in such case might fairly object to be made liable for such damages as are claimed; because he might say that but for the Interpleader Act, he would not be; that the risk would have been with the sheriff, whose duty it was to determine whether or no he would seize and sell; that he was quite content with the sheriff's responsibility, and that the Interpleader Act was never intended to augment his responsibility. This does not show that the case is not hard on the plaintiff; but it goes to show that a decision in his favour would be hard on the defendant, and that, if the loss is to be borne at all, it should be by the sheriff, for whose protection that is ordered which results in the loss to the plaintiff of which he complains. But, however this may be, our judgment is that the plaintiff cannot recover more than the 50*l.* found by the arbitrator.

***633] *WILKINSON v. FAIRRIE and Another. Nov. 25.**

The plaintiff, a carman, was sent by his employer to the defendant's premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase and was seriously injured.—Held, that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase.

THE declaration stated that the defendants, before and at the time of the committing of the grievance, and of the occurring of the injury and damage hereinafter mentioned, were lawfully possessed of and in the occupation of a certain messuage, warehouse, and premises, wherein they carried on their business as sugar bakers, and in which said warehouse there was a certain hole or aperture: Yet the defendants, well knowing the premises, whilst they were so possessed and in the occupation of the said messuage, warehouse, and premises, and so carried on their business therein as aforesaid, and whilst there was such hole or aperture as aforesaid, wrongfully, and contrary to their duty in that behalf, permitted the said hole or aperture to be and continue, and the same was then so badly, insufficiently, and defectively covered and protected, and the part of the warehouse in which the said hole or aperture was situated was then so insufficiently and ineffectually lighted, that, by means of the premises, and for want of a proper and sufficient covering and protection to and a sufficient and effectual light near or about the said hole or aperture, the plaintiff, who was then lawfully passing in and about the said warehouse for the purpose of transacting certain lawful business with the defendants in the way of their said trade, fell into the said hole or aperture, and thereby the plaintiff was greatly injured and damaged.

Pleas (inter alia).—First: Not guilty. Thirdly, that it was not the duty of the defendants to cover and protect the said hole or aperture, or to light that part of the said warehouse near or about the said hole or aperture, as alleged.—Issues thereon.

*At the trial, before Bramwell, B., at the London Sittings [*634 after last Trinity Term, the following facts appeared.—The plaintiff, who was a carman in the employment of one Dale, was sent by his master to the warehouse of the defendants, who were sugar refiners in Church Lane, Whitechapel, for a tierce of sugar. The plaintiff delivered his order to the defendant's gatekeeper, as he had done on former occasions. The gatekeeper directed him to wait in the road opposite the "shoot" with the cart until the sugar was delivered to him. After waiting some time, the sugar not being brought to him, and not being able to make any one hear, the plaintiff left his horse and cart at the "shoot" and again applied to the gatekeeper, who told him to go into the yard and through a door on the left hand side, and then up stairs, where he would find the delivery foreman or warehouseman in the counting-house. The plaintiff went into the yard and through the door, but, it being late in the evening and the place very dark, he could not see his way, and after proceeding a few steps fell down a staircase and was severely injured. There was no danger in going there when it was light.

Upon these facts, the learned Judge nonsuited the plaintiff, being of opinion that, if he could see his way, the accident was the result of his own negligence; if he could not see his way, he ought not to have proceeded without a light.

B. C. Robinson moved to set aside the nonsuit on the ground of misdirection (Nov. 7).—There was evidence of negligence on the part of the defendants. It was the duty of the plaintiff to get the sugar for his employer, and, after waiting some time for it, he was told by the defendants' gatekeeper to go to a place which was dangerous. Even

a trespasser may maintain an action for injury caused by the wrongful *635] act of the person on whose land he trespasses: *Bird v. Holbrook, 4 Bing. 628 (E. C. L. R. vol. 13), Lynch v. Nurdin, 1 Q. B. 29 (E. C. L. R. vol. 41), Jordin v. Crump, 8 M. & W. 782.† But here the plaintiff was acting in the discharge of his duty; and he pursued the direction given to him by the defendants' servant. The defendants ought either to have lighted the place, or fenced the staircase: Barnes v. Ward, 9 C. B. 392 (E. C. L. R. vol. 67). [BRAMWELL, B.—The plaintiff walked in the dark, and thereby met with the accident.] In pursuing the directions of the defendants' servant, the plaintiff would naturally expect that he might walk in safety.

Cur. adv. vult.

POLLOCK, C. B., now said.—This was an application to set aside a nonsuit directed by my brother Bramwell; and we are all of opinion that there ought to be no rule.

The action was brought against the owners of certain premises on which the plaintiff had sustained serious personal injury. The plaintiff, who was a carman, was sent by his master to the defendants' premises to fetch some goods. He went there late in the evening; and, after waiting some time, he was directed by a servant of the defendants to go to a place where he would find their warehouseman. He accordingly proceeded there, and, in going along a dark passage, fell down a staircase. My brother Bramwell directed a nonsuit upon this alternative—if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light; if it was sufficiently light for him to see, he might have avoided the staircase, which is a very different thing from a hole or a trapdoor, through which a person may fall. We think the nonsuit was perfectly right. I am not aware of any question which could have been left to the jury. It certainly was not the duty of the defendants to light the passage. In general it is the duty of every person to take care of his own safety, *636] and not to walk along a dark passage without a light to disclose to him any danger. As there was no contract, or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right.

Rule refused.

In re WORMAN. Nov. 3.

When an attorney does not appear to show cause against a rule calling on him to answer the matters of an affidavit, the Court will make the rule absolute to answer within a certain time, and in default that an attachment issue against him, and also that he be struck off the roll.

DOWDESWELL, in last Trinity Term (June 7), had obtained a rule calling on Robert Worman, an attorney of this Court, to answer the matters of certain affidavits. The rule was returnable on the 13th of June, but on the application of Worman was enlarged until the first day of the present term.

Dowdeswell now moved to make the rule absolute, no cause being shown, and also to strike Worman off the roll, or to issue an attach-

ment against him. In *re Crossley*, 6 T. R. 701, is an authority that an attachment may issue where an attorney has not answered the matters of an affidavit. [BRAMWELL, B.—There is this difficulty: the rule calls on the attorney to show cause why he should not answer the matters of the affidavit, and, as he shows no cause, the rule would be absolute that he answer them.] The Court have refused to grant a rule in the alternative, calling on the attorney to show cause why he should not answer the matters of an affidavit, or why he should not be struck off the roll: Arch. Prac. p. 149, 11th ed. [BRAMWELL, B.—Although the rule in form calls upon the attorney to show cause why he should not answer the matters of the affidavits, *it is [*637 in substance an order upon him to do so. He admits that the rule ought to be absolute, and he ought to be called upon to show cause why an attachment should not issue against him, or why he should not be struck off the roll.]

Per CURIAM.(a)—The rule must be absolute to answer the matters in the affidavit within ten days, and in default of his so doing that an attachment do issue against him, and also that he be struck off the roll.

Rule absolute accordingly.

(a) Pollock, C. B., Bramwell, B., and Channell, B.

Ex parte BUTLER. In re JAY v. MARY AMPHLETT. Nov. 21.

The Court will not discharge a married woman in custody under a ca. sa. issued on a judgment obtained against her whilst sole, if it appear that she has property settled to her separate use.

Where, in such a case, the husband has obtained an order in bankruptcy for his discharge, the Court will not interfere on motion, but will allow a writ of *audita querela* to issue.

THIS was an application to discharge a married woman out of custody under a writ of ca. sa. issued on a judgment for 60*l.*, obtained against her whilst sole.—The affidavit in support of the application, sworn on the 13th November, 1862, stated that, on the 1st day of February, 1862, she was married to George Butler, who is now living: that she was entitled, under the will of her late mother, Eliza Amphlett, deceased, and an order of the Court of Chancery, dated the 22d day of March last, made in a cause of "*Benyon v. Amphlett*," to the interest of 480*l.* 13*s.* 1*d.* Bank 3*l.* per cent. annuities and 840*l.* 12*s.* 7*d.*, New 3*l.* per cent. annuities (subject to reduction by payment of the costs by the said order directed to be paid) for her separate and inalienable use: that she was not entitled to any other separate property, nor to any property whatever out of which she can discharge the debt in this action: that, on the 29th day of October last she was arrested by and is now in the custody of the sheriff of Essex under a writ of *capias ad satisfaciendum* under the judgment in this action.—*A similar application had been made to Martin, B., at Chambers, and refused. [*638

C. Pollock, in support of the application.—No doubt there are authorities that the mere fact of a married woman having no separate property is not sufficient to entitle her to her discharge out of custody under a writ of ca. sa.: *Benyon v. Jones*, 15 M. & W. 566,† *Larkin v.*

Marshall, 4 Exch. 804.† But that rule has been considered too strict, and the Court will in its discretion discharge a married woman out of custody unless it is shown that she has separate property which may be applied in satisfaction of the debt: *Ivens v. Butler*, 7 E. & B. 159 (E. C. L. R. vol. 90). Another ground on which the defendant is entitled to her discharge is that she cannot obtain her release by means of the bankrupt law. A married woman could not petition under the Insolvent Act, 1 Geo. 4, c. 119, s. 25, because she was not capable of executing a warrant of attorney: *Ex parte Deacon*, 5 B. & Ald. 759 (E. C. L. R. vol. 7). By the 1 & 2 Vict. c. 110, s. 101, express power was given to a married woman to petition the Insolvent Court, but there is no such provision in the Bankruptcy Act, 1861. [BRAMWELL, B.—The reason probably is that formerly a married woman was not subject to the bankrupt law, as she could not be a trader, but now trading is not necessary in order to petition in bankruptcy.]

POLLOCK, C. B.—It is sufficient to say that this is not a case in which we ought to interfere.

BRAMWELL, B., and CHANNELL, B., concurred.

Rule refused.(a)

(a) In the following Easter Term *J. Brown* renewed the application on the ground that, on the 26th February, 1863, the husband had become bankrupt and obtained his order of discharge. *Holl* showed cause (May 8), when the Court refused to interfere on motion, but allowed the defendant to issue a writ of *audita querela*.

Erchequer Reports.

HILARY TERM, 26 VICT. 1863.

THE ATTORNEY-GENERAL *v.* GARDNER. *Jan. 12.*

A testator who died before the 19th May, 1853 (the day on which the Succession Duty Act came into operation), devised a reversion, in respect of which he would not have been liable to succession duty, if it had vested in possession in his lifetime after that date.—Held, that he thereby created a new succession which was not exempt from duty under the 15th section of the Act.

Therefore where A. (who died before the 19th of May, 1853), devised to C., a stranger in blood, a reversionary property to which he had become entitled by the exercise of a power of appointment contained in a settlement made by himself:—Held, that when, on the death of the tenant for life (which happened after the 19th of May, 1853), the property vested in possession, C. took a succession under the devise upon which duty was payable at the rate of 10*l.* per cent.

INFORMATION in equity by the Attorney-General, as follows:—

1. The object of this information is to obtain from the defendant payment of the duty owing to her Majesty in respect of his succession in certain real property, called Soham Mere, to which he became beneficially entitled in possession upon the death of the Marchioness Townshend as hereinafter stated. The question for the decision of the Court is as to the rate of duty payable in respect of such succession.

2. By an indenture of settlement, made on the 11th May, 1807, previously to the marriage which was shortly afterwards solemnized between the late Marquis Townshend and the late Marchioness Townshend (then Sarah Gardner Dunn Gardner), it was declared that the trustees therein named should stand possessed of a sum of 25,000*l.* Navy 5*l.* per cent. Bank Annuities, then lately transferred into their names by William Dunn Gardner (the lady's father), upon certain trusts, which were in effect for the benefit of the *husband and wife successively for life, and after the death of the survivor for the [*640 benefit of the issue of the marriage as therein mentioned; and in case (which happened) there should be no child of the said marriage, then in trust for such persons as the wife should by deed or will appoint, and in default of appointment for herself absolutely.

3. The said Bank Annuities were afterwards sold and the produce was, pursuant to a power for that purpose contained in the said indenture of settlement, invested in the purchase of certain real property

called Soham Mere, which was thereupon conveyed so as to become subject to the trusts of the before stated indenture of settlement.

4. After the said marriage had been solemnized, that is to say, on the 26th December, 1808, the said Marchioness Townshend, by an indenture or deed of that date, pursuant to the power given or reserved to her by the said indenture of settlement, duly appointed the said property called Soham Mere, from and after the death of the survivor of her husband and herself without issue as aforesaid, to such uses as her father, the said William Dunn Gardner, should by deed or will appoint, and in default of appointment to the use of the said William Dunn Gardner, his heirs and assigns forever.

5. Under the circumstances hereinbefore stated, the said William Dunn Gardner had become and was, at the time of making the will as hereinafter stated, the absolute owner of the said real property called Soham Mere, in reversion expectant on the death of the survivor of the said Marquis and Marchioness Townshend without issue of marriage.

6. The said William Dunn Gardner died on the 10th November, 1831, having by his will, dated the 16th August, 1831, given and devised all his estate and interest in the said real property called Soham Mere to the above-named defendant John Dunn Gardner during his life, with remainder to his first and other sons in tail male.

*641] *7. The said Marchioness Townshend survived her husband, who died on the 31st December, 1855, and she herself died on the 11th September 1858, after the time appointed for the commencement of the Succession Duty Act, 1853, without having ever had any child by her said husband; and the Attorney-General submits and insists that upon her death the defendant became entitled in possession to the real property called Soham Mere, as a succession derived by him from the said testator William Dunn Gardner, by reason of the disposition thereof made by his will, as hereinbefore stated.

8. The defendant is a stranger in blood to the said testator, and application has been made to him for payment of duty at the rate of 10l. per cent. in respect of the aforesaid succession, which is, as the Attorney-General submits and insists, the proper rate of duty. But the defendant declines to pay the same.

The bill prayed (inter alia) a declaration that duty at the rate of 10l. per cent. was payable by the defendant, in respect of his succession in the Soham Mere estate.

The defendant, by his answer, admitted the material statements in the bill; but he also stated the additional fact, that the 25,000l. Bank Annuities were, prior to the execution of the settlement, the property of William Dunn Gardner, and that he was, in fact, the settlor thereof, and settled the same by the settlement. Under these circumstances, he submitted that he was not chargeable with any succession duty at all; but that if the Court should be of opinion that he was chargeable with some succession duty, then that the proper rate was 1l. per cent.

The Attorney-General, The Solicitor-General, Locke, and Hanson argued for the Crown in last Michaelmas Term (November 20th).—

*642] The Crown is entitled to duty at the *rate of 10l. per cent. as upon a succession derived by the defendant under the will of

William Dunn Gardner, who is the predecessor. The case falls within the express words of the 2d section of the Act regulating succession duty, 16 & 17 Vict. c. 51.—There is a “past disposition of property by reason whereof some person” viz. the defendant “has become beneficially entitled to property upon the death of some person” viz. the Marchioness Townshend, “dying after the time appointed for the commencement of this Act.” Unless, therefore, the effect of that section is modified by some of the succeeding sections, the claim of the Crown is established. It is concluded by authority, and will hardly now be contested by the defendant, that the Succession Duty Act, 1853, operates on estates which were created and vested in interest before that Act came into operation, but which did not vest in possession until after that date: *The Attorney-General v. Middleton*, 3 H. & N. 125,† *Wilcox v. Smith*, 4 Drewry 40. But the point upon which reliance will probably be placed is, that William Dunn Gardner, being the donor of, and appointee under a power of which his daughter was the donee, took under a disposition made by himself; and since, but for that disposition, he would not, if he had survived the passing of the Succession Duty Act, have been liable to duty, so, by the operation of the 12th section, he would still be exempt; and that, then, by the effect of the 15th section, the defendant would stand in the same position, and be also exempt. Now the duty is imposed by the conjoint operation of the 2d and 10th sections, and the five sections following the 10th modify the rate of duty in particular cases. The first branch of the 15th section is as follows: “Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation *or other derivative title, in any person other than the person [*643 who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the 2d section of this Act, then the person in whom such property shall be so vested *shall be chargeable* with duty in respect thereof as a succession, at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created.” From the language there used it is apparent that the clause is dealing, not with a case in which the alienor is, as in the present case, wholly exonerated from duty, but with one in which he would himself have paid duty if he had not aliened. The point, however, has already been twice decided in favour of the Crown. In the case of *Re Jenkinson*, 24 Beav. 64, by the effect of certain instruments executed in 1852, between Sir Charles and Sir George Jenkinson, a sum of 25,000*l.*, of which Sir Charles was regarded as the purchaser from Sir George, was to be paid after the death of Sir Charles without issue male, out of the estates which would then devolve upon Sir George. Of this 25,000*l.*, 20,000*l.* was contemporaneously settled upon the daughters of Sir Charles, and the other 5000*l.* was left as part of Sir Charles's personal estate. It was held, under the 17th section, that upon the 5000*l.* no duty was payable, as being purchased by Sir Charles for his own benefit, and, in substance, derived from himself, but that upon the 20,000*l.* the daughters were chargeable with duty, as upon a succession derived from their father, and that the 15th section did not apply. In the

case of *The Attorney-General v. Yelverton*, 7 H. & N. 306,† by deeds executed in 1850, a tenant in tail in remainder of certain settled estates, for valuable consideration, charged them with 20,000*l.*, for the use of the tenant for life, payable twelve months after the *644] *determination or failure of the limitations to two persons, of whom the tenant for life was one, for their lives, and to their sons in tail male; and the tenant for life forthwith assigned the 20,000*l.* to trustees in trust for his adopted children. It was held that succession duty was payable thereon. Martin, B., in delivering the judgment of the majority of the Court, said: "The 15th section has been referred to: we cannot appreciate its application. It seems to us to refer to a species of property different from that on which the duty is claimed in the present case, that is to say, a reversionary property in respect of which the assignor would have been liable to duty, but which he has assigned." The judgment of Bramwell, B., who, in that case, differed from the rest of the Court, proceeds on the ground that there the alienee would not be liable to succession duty, as between himself and the alienor; but here it is submitted that, under the 2d section, he would be so liable. The case therefore falls within the express words of the 2d and 10th sections, and is not taken out of them by the 12th or 15th sections.

Lush and J. Chitty, for the defendants.—The Crown is not entitled to the payment of any duty. It is not, however, disputed on the part of the defendant, that he is a successor within the meaning of the 2d section of the Act. But that section does not impose duties. It simply defines the terms "successor" and "predecessor," with a view to the construction of the subsequent sections. It is admitted that the defendant would be liable to duty if he were not exempt by the operation of the 12th and 15th sections. William Dunn Gardner, in settling this property upon his daughter's marriage, gave to her a power of appointing the ultimate remainder, which she afterwards exercised *645] in her father's favour. Now, applying the general *rule of law, that limitations created by the execution of a power must be read as if they were introduced into the instrument creating them, the limitations to William Dunn Gardner, under the execution of the power, must be read into the original settlement. Thus, William Dunn Gardner takes a succession under a disposition made by himself, and, if he had survived his daughter, he would, under the 12th section, have been exempt from duty; and then the defendant, as alienee or derivative owner of William Dunn Gardner's reversionary interest, would have stood in the same position under the first branch of the 15th section. That branch of the section had for its object the exemption of all persons who had obtained reversions by means of alienations before the passing of the Act, by putting them in the position of their alienors; since it would have been a manifest hardship to subject to a 10 per cent. tax, as strangers in blood, those who had purchased reversions before the Act was passed. The argument of the Crown, that the 15th section applies only to cases where some duty is payable, involves this anomaly, that, if William Dunn Gardner had taken a succession from his daughter, the defendant would stand in his place as alienee, and pay only 1*l.* per cent. duty; but where, as in the present case, he takes under his own disposition, and

would therefore, if he had survived his daughter, have paid nothing, the defendant, or even a purchaser for value from William Dunn Gardner, would be chargeable with a 10% per cent. duty. The cases of *Re Jenkinson*, 24 Beav. 64, and *The Attorney-General v. Yelverton*, 7 H. & N. 306,† are not authorities in favour of the Crown. In the former case the Master of the Rolls decided that the 15th section was not applicable, on the ground that the 25,000% was not reversionary property. It was money charged upon the estate, and not part of the estate; and though money might *be so settled as to constitute reversionary property, it was not so settled, when, [*646 as there, it was only to come into existence on a future and contingent event. It is a fair inference from the judgment of the Master of the Rolls that, if the 25,000% had been an existing sum of money at the time of the settlement, the 15th section would, in his judgment, have been applicable. So, in *The Attorney-General v. Yelverton*, 7 H. & N. 306,† it appears from the judgment of the majority of the Court that they considered the 20,000%, which was to become payable on a contingent event, was not reversionary property within the 15th section. [MARTIN, B.—Was not William Dunn Gardner the alienee of his daughter's reversion?] No: he took under the settlement which created the power: In *re Barker*, 7 H. & N. 109,† *Lord Braybooke's Case*, 9 H. L. 150, *Sir Edward Clere's Case*, 6 Rep. 17 b, *Sugden on Powers*, p. 93, 8th ed. The uses could not be served out of the daughter's remainder, as the power was executed during coverture, and a fine would have been requisite to pass her estate. As this power was exercised before the Act came into operation, the 4th section does not apply. In the first branch of the 15th section, the word "alienation" is a term of the largest import, and must, it is submitted, include a devise by a testator who died prior to 1853; in the second branch of the section, which relates to alienations subsequent to the Act, the language is studiously different, the words "or any title not conferring a new succession" being expressly introduced. [BRAMWELL, B.—Are not those words to be implied in the first branch of the section? Is not the statement of them in the second branch unnecessary?] To imply the words would, it is submitted, be to tax by implication. [MARTIN, B.—Would William Dunn Gardner have *become entitled by reason of a disposition within the 2d section? Would he not come in upon his old estate?] He would [*647 undoubtedly come in under his own settlement, but nevertheless a reversionary interest was thereby created. That interest has now become vested by alienation in the defendant, within the meaning of the 15th section, and, if so, he is not liable to any duty.—They also referred to *Lovelace's Case*, 4 De Gex & J. 340.

The Attorney-General, in reply.—There is no section in the Act, by which any duty could have been imposed on William Dunn Gardner if he had survived the Marchioness. The 12th section, upon which reliance has been placed, merely states affirmatively what might have been deduced negatively from the 10th section, which does not impose any duty where a person takes under his own disposition. It has been put as a hardship that, if the Crown be correct, those who purchased reversions before the Act was passed might be liable to a 10% per cent. duty, while their alienors would have been altogether exempt.

In such a case, the purchaser might be regarded as the disponent, since the property, having been attained by his money, might be said to come from him. The Attorney-General *v. Baker*, 4 H. & N. 19,† and The Attorney-General *v. Yelverton*, 7 H. & N. 306,† are authorities which support this view. At all events, no sufficient argument has been advanced to induce the Court to discard the plain language of the 15th section, which applies only to those cases where the alienor is himself chargeable with some duty. Again, even if a devisee of the entire fee can be regarded as an alienee within that section, can it be contended that, where there are a series of limitations, each of the *648] persons upon whom in succession the estate would *devolve is also such an alienee? If so, the revenue might be deprived of duty until there was a failure of heirs in tail. But, if not, why should the devisee of a life estate be an alienee within that section? Upon these grounds, it is submitted that the Crown is clearly entitled to duty at 10*l.* per cent.

The judgment of the Court was now delivered by

MARTIN, B.—This is an information for succession duty. By a marriage settlement, on the marriage of the Marquis and Marchioness of Townshend, made in the year 1807, a sum of 25,000*l.* Navy 5*l.* per cent. Bank Annuities was settled by William Dunn Gardner, the lady's father, upon certain trusts. These annuities were afterwards sold, and, in pursuance of a power contained in the settlement, an estate called Soham Mere was purchased and conveyed, subject to the same trusts as in the settlement. These were for the husband and wife successively for life, and after the death of the survivor for the benefit of the issue of the marriage, and should there be no child (which was the case) then in trust for such persons as the Marchioness should by deed or will appoint, and in default of appointment for herself absolutely. After the marriage the Marchioness, by deed of the 26th of December, 1808, executed the power vested in her, and appointed the Soham Mere estate, after the death of her husband and herself without issue, to such uses as her father should appoint, and in default of appointment to the use of her father, his heirs and assigns, for ever. On the 10th of November, 1831, William Dunn Gardner, by will, devised the estate to the defendant (a stranger in blood) for life, with remainder to his first and other sons in tail, and soon afterwards died. The Marchioness survived her husband, and died in 1858, *without ever *649] having had a child. The Succession Duty Act came into operation in May, 1853, and the Attorney-General claimed duty at the rate of 10*l.* per cent. The defendant contended that he was not chargeable with duty at all, or, if to any, at the rate of 1*l.* per cent. only.

It was admitted by Mr. *Lush* and Mr. *J. Chitty*, who argued the case for the defendant, that the will of William Dunn Gardner was a past disposition of property, by reason whereof the defendant became beneficially entitled, within the 2d section, to property upon the death of the Marchioness, who had died after the time appointed for the commencement of the Act. William Dunn Gardner, at the time of making his will, was absolute owner in fee simple of an estate, which, for the purpose of the succession duty, must be deemed a reversion, expectant upon the estates for life of the Marquis and Marchioness and the con-

tingent estates to the unborn children. This estate is as well known and recognised in law as an estate in fee simple in possession. It might have been sold, or mortgaged, or leased, or dealt with, in like manner as any other fee simple estate, and, in fact, was devised to the defendant by will; and it is difficult to see why succession duty should not be payable upon a disposition of it. The simple and proximate state of facts was, that a testator, owner in fee simple of a reversion expectant upon life and contingent estates, made a will, and devised an estate for life to the defendant, who therefore took by devise an estate from an owner in fee simple, and it would seem to be immaterial what was the nature of the testator's title, or how he became possessed of the property. In truth, he, by his will, created a new succession, the defendant taking a beneficial interest by devise carved by him out of his estate in fee simple in the reversion. It is according to the ordinary rule of law that the proximate state of things, and not the remote, is to be regarded.

*But it was contended, on behalf of the defendant, that he is not chargeable with duty by virtue of the 12th and 15th sections. [*650 The argument was, that William Dunn Gardner having taken the reversion in fee under the power of appointment conferred upon the Marchioness by the marriage settlement, the case was the same as if his name had been originally inserted in the settlement with the same limitation. For this position a passage in the judgment of Lord Kingsdown in the Braybrooke Case, 9 H. L. 450, in the House of Lords, was cited. The defendant therefore, it was said, took a succession under a disposition made by himself within the meaning of the 12th section, and under the circumstances of this case would not himself have been chargeable with duty; that the property was reversionary property expectant upon the deaths of the Marquis and Marchioness, and that, by the 15th section, this reversionary property being vested in the defendant by alienation, viz., by will, he was only chargeable with duty at the same time and at the same rate as the testator (the person originally entitled) would have been, and as he would not have been chargeable with duty, neither was the defendant. This argument is founded upon the position that the estate of William Dunn Gardner must be deemed to be as one inserted in the marriage settlement, and, assuming this to be so, nevertheless the argument on behalf of the defendant seems to us to be fallacious. Assuming the estate to William Dunn Gardner to have been inserted in the settlement, the limitation would have been to the Marquis for life, remainder to the Marchioness for life, contingent remainders (which never vested) to their children, remainder to William Dunn Gardner in fee. This would be improperly called a remainder. It really would have been a reversion and part of the old fee simple of William Dunn Gardner,—it would *never have passed out of him; and when the Marquis and Marchioness died without children, and the particular estates [*651 thereby determined, he or his heirs or devisees would become entitled to the possession, not of a new estate, but by reason of the old ownership. Under such circumstances it is quite clear that William Dunn Gardner would not have been chargeable to succession duty. First, the title to the possession being by reason of the old reversion, our impression is that it was not a succession at all,—it was a mere repos-

session of the old estate after the particular estates created by him had become extinct. But, secondly, it is expressly declared not to be chargeable by the latter part of the 12th section, which enacts, that no person shall be chargeable with duty upon the extinction or determination of any estates created by himself, unless at the date of its creation he was entitled to the property expectant upon the death of some person dying after the time appointed for the commencement of this Act. This was not the position of William Dunn Gardner when the estates of the Marquis and Marchioness were created. And, thirdly, in order to the chargeability to duty there must be a predecessor and a successor who are different persons. Upon the assumption of the defendant, William Dunn Gardner filled both characters. In fact he would have been successor to himself. But we think the first part of the 12th section does not apply to such a case as the present at all. When the owner of a reversion in fee not chargeable to succession duty makes a will and devises the reversion, it seems to us that he creates or confers a new succession, and that the Act is to be applied to it in its simple and direct application in like manner as if he had been owner of the fee simple in possession. And what this part of the 12th section seems to us to refer to is such a case as Lord Braybrooke's, and several others which have come before the Courts, *652] where a man chargeable to succession duty makes a disposition of property, in which case he is to be chargeable as if no such disposition had been made. And the first part of the 15th section seems to us to refer to the case of an alienation of reversionary property by an alienor chargeable himself to duty, in which case the alienee is subjected to the same duty. In the infinite variety of cases and circumstances to which the Succession Duty Act may be sought to be applied, it may be that it will turn out to be otherwise; but our impression strongly is, that the first parts of the 12th and 15th sections apply only to cases where the disponent or alienor would himself be chargeable to duty, and do not apply to a case like the present where he would not.

Several cases were cited by the learned counsel on both sides. The Attorney-General *v. Yelverton*, 7 H. & N. 306,† was alleged to be a direct authority in favour of the Attorney-General, and it seems to us to be so. In substance, the settlement of the money in that case constituted a new succession. The expression of Lord Kingsdown in Lord Braybrooke's Case, 9 H. L. 150, and the case *In re Barker*, 7 H. & N. 109,† were relied upon on behalf of the defendant. We do not dissent from either, but they seem to have no application to this case. We would merely observe that when it is said that a limitation created under a power must be read as if it was introduced into the deed creating the power, it seems to be rather a similitude than a rule—that generally it is as if the limitation had been contained in the original deed, and not that under all circumstances it is absolutely to be so read. If it is to be deemed and considered as an abstract, positive, absolute rule of law, it would be difficult to understand how the grant of a lease or rent charge by the tenant for life *653] having a power of appointment would not be defeated by the exercise of the power: 1 Sugden on Powers, p. 81.

As to the duty at the rate of 1*l.* per cent., we are not aware that

any argument was used to show that such was the proper rate. The lawful rate, in our opinion, is 10 $\frac{1}{2}$ per cent., as claimed by the Attorney-General.

BRAMWELL, B.(a)—I concur in the judgment pronounced, but I wish to say a few words in addition. William Dunn Gardner is entitled to an estate in reversion or remainder, it seems to me immaterial which, as also how he got it. This estate he devised to the defendant. If *The Attorney-General v. Yelverton* was well decided the case is concluded; but though I defer to the authority of that case, I confess I am not convinced by it. Still, independently of that authority, I think the Crown is entitled to judgment. To my mind the property is not "vested by alienation or other derivative title" in the defendant within section 15. I think a title by will is not within those words, but it is such a disposition as would be, if of money, "a disposition or devolution such as in itself to create a succession within the provisions of the Act" within section 17; and is within section 2, and creates a succession between the defendant and William Dunn Gardner. It is clear that had William Dunn Gardner died intestate his heir would have taken a succession. Why not his devisee? This opinion is in conformity with what I suggested in *The Attorney-General v. Yelverton*.
Judgment for the Crown.

(a) His lordship made these remarks on the 15th of January, and stated he had intended to make them when the judgment of the Court was delivered.

***In re a Plaintiff in the County Court of Yorkshire, between CHARLES DENTON, Plaintiff, and JAMES MARSHALL and Others, Defendant. Jan. 14. [*654]**

Upon the hearing of a plaintiff in a County Court on the 11th of September, an objection to the jurisdiction was overruled and judgment given for the plaintiff. On the 20th of September notice was given of the defendants' intention to apply for a writ of prohibition. On the 10th of October the debt and costs were paid to the Registrar to prevent an execution, and on the same day a summons was taken out at Chambers, returnable on the 14th, calling on the County Court judge and the plaintiff to show cause why a writ of prohibition should not issue. On the 13th it was served. On the 16th the Registrar paid over the debt and costs to the plaintiff's attorney.—Held, that the defendants' delay had disentitled them to a writ of prohibition.

Quare, whether in prohibition the Court will award restitution? *Semble*, per Martin, B., not, when the subject-matter of the suit is no longer within the control of the inferior Court.

Semble, that where a dispute has arisen between a member and the trustees of a Friendly Society, for the decision of which a specific tribunal is provided by the rules of the Society, the jurisdiction of the County Court is ousted.

THIS was an application for a writ of prohibition to the County Court of Yorkshire, holden at Kingston-upon-Hull.

The defendants were members and trustees of the Hull District of "The Independent Order of Odd Fellows Manchester Unity Friendly Society," and the plaintiff was a member of the Loyal Victory Lodge, which is an auxiliary branch of the Hull District. The rules or laws of the said Order, District and Lodge had respectively been certified by the Registrar of Friendly Societies as being in conformity with the 13 & 14 Vict. c. 115, the statute then in force relating to Friendly Societies. The 18 & 19 Vict. c. 63, s. 40 (by which statute

the 13 & 14 Vict. c. 115, is repealed), enacts "that every dispute between any member or members of any Society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such Society, and the trustee, treasurer or other officer, or the committee thereof, shall be decided in manner directed by the rules of such Society, and the decision so made shall be binding and conclusive on all parties without appeal." By the 32d rule of the said Lodge: "If any dispute arise between a member or any person claiming under or on account of a member of this Lodge, if the amount in dispute exceed the sum *655] of 21s., then such dispute shall be *heard by a committee chosen under the 191st general law of the said Order, and the decision made by such committee shall be binding and conclusive, unless appealed against by a committee of the district within six months of the decision. The decision of the district committee may within six months of its being passed be appealed against to the directors of the said Order by either of the disputing parties, and the decision of the directors shall be final and conclusive." The 191st general law of the said Order points out how the committee, to whose arbitration the dispute is to be referred, is to be constituted.

The plaintiff, upon his wife's death, made a claim upon his Lodge for the sum of 10*l.*, under the 33d district law, but the claim was disputed upon the ground that he was not good upon the books of the Lodge within the meaning of that law, and that he was disentitled to it by the operation of the 35th district law, in consequence of his subscriptions having, as the defendants alleged, been in arrear within fourteen weeks of his wife's death. The plaintiff, instead of adopting the course pointed out by the rules, thereupon entered a plaint in the County Court, holden at Kingston-upon-Hull, against the defendants, as trustees of the Hull District, to recover the above amount. At the hearing, on the 11th of September, 1862, the defendants, who appeared in person, objected to the jurisdiction of the County Court Judge on the ground that by the 18 & 19 Vict. c. 63, s. 40, and by the rules of the Society, his jurisdiction was taken away; but the Judge overruled the objection and proceeded to try the question in dispute, and ultimately gave judgment for the plaintiff for the amount claimed with costs.

On the 20th of September, 1862, notice of the defendants' intention to apply for a writ of prohibition was served on the Registrar of the County Court and on the plaintiff, and on the 23d and 24th of September similar *656] *notices were served on the County Court Judge and the plaintiff's attorney respectively. On the 8th of October an order of the County Court for the payment of the sum of 10*l.* for debt and 2*l.* 10*s.* for costs was served on the defendants. The defendant Marshall, on the 10th of October, paid the amount to the Registrar of the County Court to prevent a seizure under an execution. On the same day a summons, returnable on the 14th of October, was obtained, on behalf of the defendants, at Chambers, calling on the Judge of the County Court and the plaintiff to show cause why a writ of prohibition should not issue. This summons was served on the 13th of October. On the 16th of October the debt and costs were paid over to the plaintiff's attorney by the Registrar, who did not

appear to have had any notice of this summons having been obtained.

Upon the return of the summons it was adjourned till the 24th, and it was then arranged that the question should be referred to the Court, and subsequently it was ordered to stand over by consent to the present Term.

Davison, in support of the motion.—First, the jurisdiction of the County Court was ousted when a dispute was shown to exist for the settlement of which the rules of the Society provided. By the 18 & 19 Vict. c. 63, s. 40, such disputes are to be decided in the manner directed by the rules of the Society, and that decision is to be final. By the 41st section, where the rules of the Society do not prescribe any other mode of settling such disputes, the County Court shall have jurisdiction. Thus, the 40th section takes away its jurisdiction in disputes to which the Society's rules apply; the 41st section gives it jurisdiction where they do not. Here the 32d Lodge rule and the 191st general law provide a tribunal for the regulation of disputes above 21s. [MARTIN, B.—Where a specific tribunal is appointed by the rules of a Friendly Society, that tribunal has by the statute exclusive *jurisdiction, and the jurisdiction of the County Court is ousted.] [*657] In *Turner v. Scott*, (a) Coleridge, J., at Chambers, granted a prohibition to the County Court, on the ground that it had no jurisdiction where the certified rules of a Friendly Society provided for the reference of disputes contemplated by the 40th section to a committee of the Society. In *Sinden v. Bankes*, 30 L. J., N. S., Q. B. 102, Crompton, J., states the result of the authorities thus:—"It must be taken to be established by the cases which have been decided upon the subject, that if disputes between these societies and their members are ordered by the rules to be referred, and if the statute provides that the rules shall so order, then that any such dispute must be referred, and the remedy by action is taken away." Hill, J., in the same case, says, that "the desire of the legislature was to protect the property of these societies by preventing the expenditure of their funds in useless and expensive litigation, and to provide a cheap and speedy remedy."

Secondly, the application is not too late. The delay was not, under the circumstances, unreasonable. [MARTIN, B.—What is there to prohibit when the debt and costs have been paid?] *Jones v. Owen*, 5 D. & L. 669, which in its facts closely resembles the present case, shows that the rule may be drawn up with a clause commanding restitution. In that case the execution of the warrant of possession was complete before the bailiff received notice of the rule nisi for a prohibition; but Patteson, J., sitting in the Bail Court, held that the application was in time. [MARTIN, B.—The rule nisi was there obtained before execution; but a summons has no effect until it is returnable.] The authorities show that prohibition may issue after execution. [MARTIN, B.—"Prohibition lies to a temporal Court, even after *judgment and execution, when the matter appears to be out of the jurisdiction:" Com. Dig. *Prohibition* (D.), and 2 Inst. [*658] 602. CHANNELL, B.—Must not the defect of jurisdiction appear on the face of the proceedings in order that prohibition may be granted

(a) March 2, 1857. *Watkin Williams* for the defendant, *Powell* for the plaintiff.

at that stage of the proceedings?] The recent authorities are opposed to that view. Thus, in *Marsden v. Wardle*, 3 E. & B. 695 (E. C. L. R. vol. 77), prohibition went to a County Court after goods had been seized under a judgment, although no want of jurisdiction appeared on the face of the proceedings, and Coleridge, J., said that principle had no application to the County Courts. [CHANNELL, B.—Has not that recently undergone some qualification? The want of jurisdiction may appear upon the face of the proceedings.] In general it would not do so. [MARTIN, B.—To some extent the case of *Roberts v. Humby*, 3 M. & W. 120,† is in your favour.] There the opinion of Alderson, B., is express that the Court might have interfered after execution, even if the want of jurisdiction had not appeared upon the face of the proceedings, and that the cases where it had been held otherwise turned on acquiescence. The defendants here distinctly raised the objection upon the hearing, which, it is submitted, is equivalent to the want of jurisdiction appearing upon the face of the proceedings.

The Court having granted a rule nisi,

Raymond showed cause in the first instance.—The Act which created the County Court gave it jurisdiction in a case of this kind; then is that jurisdiction necessarily ousted because a subsequent enactment gives jurisdiction to another tribunal by words which are purely affirmative? It may be argued, against the jurisdiction of the superior Courts, that the policy of the legislature was to provide a cheap and speedy remedy. The County Court is, in this respect, as appropriate a tribunal as that which the rules provide. [MARTIN, B. *659] —The legislature has expressed its intention of ousting the jurisdiction. WILDE, B.—The statute prescribes the limits of the jurisdiction of the County Court in the settlement of such disputes.] When the want of jurisdiction was made apparent the defendants should have withdrawn. [WILDE, B.—The right to prohibition exists if the jurisdiction be not acquiesced in.] The second objection is decisive. The defendants are too late. In *Ex parte Cowan*, 3 B. & Ald. 123, 129 (E. C. L. R. vol. 5), Abbott, C. J., in delivering the judgment of the Court, said: "It is a settled rule that you cannot apply for a prohibition after a judgment, unless there be an original want of jurisdiction apparent upon the face of the proceedings." In *Roberts v. Humby*, 3 M. & W. 120,† the want of jurisdiction did so appear. [POLLOCK, C. B.—If this defect of jurisdiction was distinctly brought to the notice of the County Court Judge, that would, in my opinion, be equivalent to its appearing on the face of the proceedings.] There is now nothing to prohibit; the debt and costs are paid, and no cause is pending. In *Jones v. Owen*, 5 D. & L. 669, the land was an existing thing, which had been wrongfully transferred, and the Court could order restitution. Here the money can no longer be reached. The registrar did indeed pay the money out of Court after the summons was returnable, but it does not appear that he had any notice of the summons. No substantial reason is assigned for the delay. The application is therefore too late.

Davison, in support of the rule.—The delay in vacation was not unreasonable. [POLLOCK, C. B.—The Courts are open throughout the vacation to transact all chamber business.] The plaintiff had

notice that this application *would be made. The case is identical with *Jones v. Owen*, 5 D. & L. 669, since the summons [*660 was returnable before the money was paid out of Court. The distinction between land and money is untenable. The difficulty of enforcing restitution exists equally in the case of land. Here the money is not beyond reach, since it is admitted to be in the hands of the plaintiff's solicitor.

POLLOCK, C. B.—We are all of opinion that the rule, which, technically, has been granted, should be discharged. The defendants have, I think, made out that the objection which was raised to the jurisdiction of the County Court was brought distinctly under the Judge's notice. The question, therefore, stands in my opinion on precisely the same basis as if the want of jurisdiction had appeared on the face of the proceedings. But my judgment proceeds on this, that those who seek redress must apply to the Court with promptitude, especially where the application is one of this character. In the present case, the defendants are not entitled to relief in consequence of the delay in their application. My brother Martin has pointed out that there is nothing to prohibit. There has been a judgment and an execution; the money has been paid over by the registrar, and is no longer within the control of any Court; the suit is at an end, and the possession of the plaintiff's attorney is the possession of the plaintiff. The rule must, therefore, be discharged.

MARTIN, B.—I also think that this application is too late. The consideration which influences me is, that if this money was paid under the compulsion of process from a Court which acted without jurisdiction, a remedy is still available to the defendants, by an action against those persons whose act compelled the payment. But *where there has been a trial, judgment, and execution, and [*661 the money has been paid over, I am unable to see how a writ of prohibition can issue, or, if issued, what object it can attain. There is, in such a case, nothing to prohibit. The forms of prohibition show that, before judgment, the prohibition to the inferior Court is to prohibit the holding of the plea; to the party to prohibit the following of the plea; after judgment, it is to prohibit the proceeding on the judgment. The latter form would, in the present case, be a mere nullity. If this point had now to be decided, I should wish to see some other authority than the case which has been cited (*Jones v. Owen*) in support of the proposition that the Court can, in prohibition, enforce the repayment of money which has been paid over by a proceeding against the party, or issue a writ of restitution. I do not understand by what mode this could be done, except in those cases which occur in the old entries. It could not be done by a mere order or rule of the Court. In the present case, after a step had been taken on the judgment, the application was too late.

CHANNELL, B.—I also think that this rule must be discharged, upon the ground that the application was too late. The question which in my view arises, and upon which alone I desire to express an opinion, is what locus standi the defendant in the County Court has obtained by applying at chambers for a summons for a writ of prohibition. By making that application, I think that he placed himself in the same situation as if the Court had been sitting at the

time when the summons was taken out, and the application had been made to the Court. That is the point of time which appears to me material. I think, however, that the application was then too late.

Rule discharged.

*662] *WATSON, SOUTHERN, and MAYER v. GEORGE EVANS. Jan. 19.

Document as follows:—"On demand, we jointly and severally promise to pay to Messrs. W., S., and M., or to their order, or the major part of them, the sum of 100*l*."—Held, a valid promissory note, upon which the three payees might maintain an action.

DECLARATION.—That the defendant and William Patrick Evans and George Thomas Evans, on, &c., made their joint and several promissory note in the words, letters, and figures following, and as follows, that is to say:—

"£100.

"Leamington, Dec. 2d, 1858.

"On demand, we jointly and severally promise to pay Messrs. Joseph Watson, Thomas Southern, and Daniel Mayer, or to their order, or the major part of them, the sum of one hundred pounds, with lawful interest, for value received.

"GEORGE EVANS,

"WILLIAM PATRICK EVANS,

"GEORGE THOMAS EVANS."

That the said makers, by the said names following in the said note contained, that is to say, Joseph Watson, Thomas Southern, and Daniel Mayer, meant the plaintiffs; but the defendant and the said other makers did not, nor did either of them, pay the said note.

Demurrer, and joinder therein.

Hayes, Serjt. (*C. E. Coleridge* with him), in support of the demurrer.—The document is void for uncertainty. Is the money to be paid to the three payees, or any two of them? Again, do the words "or the major part of them" refer to the payment or the endorsement, or to both? [*POLLOCK*, C. B.—Is it not a promise to pay to the three persons or their order, or the order of the major part of them?] Suppose two of them said "pay to us;" and the other said "pay all three." *663] If two alone sued, could the *maker plead in abatement the non-joinder of the third? Assuming that the promise is to pay all three provided they agree, if not to pay any two of them, suppose they all disagree, and each says, "Do not pay to the other." [*MARTIN*, B.—Payment to one of several joint creditors is a payment to all.] The general rule of law is qualified by the express words of the contract. In *Bayley on Bills*, p. 84, 5th ed., it is laid down that "uncertainty as to the person to whom the payment shall be made will prevent the document from being a bill or note; as making it payable to A. or B." The authority there cited is *Blanckenhagen v. Blundell*, 2 B. & Ald. 417, where *Abbott*, C. J., and *Holroyd*, J., agreed that such a document cannot be a promissory note within the statute 3 & 4 Anne, c. 9, the promise being conditional, to pay A. only if the maker had not paid B. [*MARTIN*, B.—Here the three payees are suing, which distinguishes the case from *Blanckenhagen v.*

Blundell.] Who is to endorse the note, the three or any two of them? [MARTIN, B.—The words, “or to their order, or the major part of them,” mean the order of all three or of any two of them. The words “or the major part of them,” must refer to the last antecedent order. WILDE, B.—It is, “I promise to pay to all three or their order, but I allow any two to sign for them all.”] If the endorsement may be made by the three, or any two of them, *Blanckenhagen v. Blundell* is an authority that the document is not a promissory note within the statute 3 & 4 Anne, c. 9. [MARTIN, B.—There cannot be any doubt in this case, as the three payees are suing. In the *Author's Life*, prefixed to the 9th edition of *Noy's Maxims* by Bythewood, p. viii., the following anecdote is related:—“Three glaziers at a fair left their money with their hostess while they went to market: one of them returned, received the money, and absconded; the other two sued the woman for delivering what she received from the three before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed; and, having received it, he moved in arrest of judgment that he was retained by the defendant, and that the case was this: the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid whenever the three men should demand it together. This motion altered the whole proceedings.”(a)] *Mellish*, appeared for the plaintiffs, but was not called upon to argue.

Per CURIAM.(b)—There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

(a) See *Brandon v. Scott*, 7 E. & B. 234 (E. C. L. R. vol. 90).

(b) *Pollock, C. B., Martin, B., and Wilde, B.*

ANONYMOUS. Jan. 22.

The six months during which a writ of summons continues in force, after its renewal, are to be computed inclusive of the day of renewal.

Therefore where a writ of summons was originally issued on the 23d of January, 1861, and successively renewed, the last renewal being on the 19th of July, 1862, and on Monday the 19th of January, 1863, the officer, on being applied to, declined to impress the renewal seal on the writ:—The Court held that the writ had expired, and refused to direct the officer to impress the seal, *nunc pro tunc*, as of that date.

THIS was an application to the Court, to direct its officer to impress the renewal seal upon a writ of summons, *nunc pro tunc*, as of the 19th of January, 1863.

*The original writ was issued on the 23d January, 1861, and under sect. 11 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it had been renewed successively, on the 22d of July, 1861, the 21st of January, 1862, and the 19th of July, 1862.

On Monday, the 19th of January, 1863, application was made at the Writ Office, to have the renewal seal affixed, but the officer

declined to affix it, on the ground that six months had elapsed since the last renewal.

Channell, B., was applied to at Chambers, but refused to make any order.

Griffiths, in support of the motion.—By the 13 & 14 Vict. c. 21, s. 4, the word "month," when it occurs in an Act of Parliament, signifies "calendar month," unless words are added showing "lunar month" to be intended. The question, therefore, is, whether the six months, during which the renewal writ is in force, are to be calculated inclusively or exclusively of the day on which it is renewed. The 11th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), enacts that "no original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month, and year of such renewal, such seal to be provided and kept for the purpose at the offices of the Masters of the said Superior Courts, and to be impressed upon the writ by the proper officer of the Court out of which such writ issued," &c. Where *666] the section deals with "the time during which the original writ is to be in force, it expressly says that the day of its date is to be included in the computation; but where it deals with the duration of the writ, after its renewal, no such words occur. In the case of *Black v. Green*, 15 C. B. 262 (E. C. L. R. vol. 80), the Court, upon a precisely similar application, ordered the seal to be affixed nunc pro tunc. The authority of that case was followed by *Crompton, J.*, in an "Anonymous Case," 24 L. J., N. S., Q. B. 23, in the Bail Court. [WILDE, B.—The point was not in either of those cases decided.] That is not contended. The cases do show, however, that the Court thought the point doubtful, and on that ground were unwilling to deprive the applicant of the opportunity of having the question considered by a Court of error. If the 174th rule of Hilary Term 1853 applies, the plaintiff is clearly in time. [WILDE, B.—The rule cannot control the statute, the terms of which are imperative.] There is no hardship on the defendant in granting this application, since he could still raise the point by a plea, that the writ had not been properly renewed. On the other hand, if the application be refused, the plaintiff's claim is for ever barred. [MARTIN, B.—By granting the application, we might impose a liability on the defendant, who might assume that it was a decision in the plaintiff's favour. POLLOCK, C. B.—If we entertained any doubt, it would be right to afford the parties the opportunity of formally raising the question upon the record. We think the point is free from doubt.]

Per CURIAM.(a)—The rule must be refused.

Rule refused.

(a) Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

***HARTLAND, PUBLIC OFFICER OF THE GLOUCESTERSHIRE BANKING COMPANY, v. JUKES and Others (Executors and Executrix of WILLIAM STEWARD, deceased).** *Jan. 28.* [*667]

C., being about to open an account with a banking Company, gave them a promissory note, dated the 4th of December, 1855, whereby he and S., the defendant, jointly and severally promised to pay to the Company, on demand, 200*l.* At the same time they signed and delivered to the Company a memorandum stating that the note was given as a collateral security for the banking account intended to be kept by C., and that the Company should be at liberty at any time thereafter to recover from them, or each of them, up to the full amount thereof, every sum which C. should at any time thereafter become indebted or liable to the Company, for any moneys paid, lent, or advanced by them to or for him; and in case of the Company suing on the note, its production should be conclusive evidence of the amount claimed by them from C. being due and owing by him. The banking account was accordingly opened with C., and on the 31st December, 1855, he was indebted to the Company in 173*l.* No demand of payment was made, or balance struck, until the 30th June, 1856, when 194*l.* was due from C. to the Company. A balance was afterwards struck every half-year, the Company from time to time making advances, and C. paying money into the bank with which his account was credited. The sums so credited exceeded the amount of the note. The account continued until February, 1861, when it was closed with a balance due to the Company of 175*l.* In March, 1862, the Company commenced an action against the defendant on the note:—Held, that the cause of action was not barred by the Statute of Limitations.

THE first count of the declaration stated that the said William Steward, in his lifetime, on the 4th day of December, A. D. 1855, by his promissory note now overdue, promised to pay the said banking Company 200*l.* on demand, but did not pay the same, and the same has not been paid.

Second count.—That, at the time of the making of the contract hereinafter mentioned, the said William Steward, in his lifetime, and one William Courtney made their promissory note in writing, and thereby jointly and severally promised to pay to the said banking Company 200*l.* on demand, and then delivered the same to the said banking Company; and the said W. Steward and W. Courtney then also made and signed and delivered to the said banking Company, together with the said promissory note, a certain instrument in writing or guarantee in the words and figures following, that is to say:—

“Memorandum.—That the joint and several promissory note, dated the 4th day of December, 1855, given by us the undersigned William Steward, of, &c., and William *Courtney, of, &c., to the Gloucestershire Banking Company for 200*l.* payable on demand, is so [*668] given by us and each of us as a further and collateral security to the said banking Company for the banking account intended to be kept by the said W. Courtney with them, and shall be held by them, and they shall be at liberty at any time hereafter to recover thereon from us and each of us, up to the full amount thereof, all and every sum and sums of money which the said W. Courtney shall or may at any time hereafter become indebted or liable to the said banking Company, for or by reason or on account of any moneys paid, lent, or advanced by the said Company to or for or on account of the said W. Courtney, or of any bills or notes discounted for or bearing the acceptance, signature, or endorsement of the said W. Courtney, or otherwise howsoever, with interest, commission, and other usual banker's charges thereon, and our and each of our liability on the

said note shall not be withdrawn while the said Company shall be the holders of any bills or notes so discounted for or bearing the acceptance of the said W. Courtney, although the same may not be at maturity; and in case of the said Company suing on our promissory note, the production thereof by the said Company shall be conclusive evidence as against the said W. Steward of the amount claimed by them from the said W. Courtney being due and owing by him to them, and they shall not be called upon or required to give any further or other proof of the amount so claimed by them being so due and owing.—Dated the 4th day of December, 1855.

“W. M. COURTNEY.

“WILLIAM STEWARD.”

Averments: that the promissory note in the instrument or guarantee mentioned was and is the promissory note above mentioned; *669] and that the banking Company in the *instrument or guarantee also mentioned was and is the banking Company mentioned; and that the said W. Steward in the said instrument or guarantee also mentioned was the said W. Steward (now deceased) mentioned; and that, for the considerations in the instrument or guarantee mentioned, expressed, and implied, and in consideration that the banking Company would suffer and permit the said W. Courtney to open a banking account with them and would give him credit upon the same, the said W. Steward then promised the banking Company to do and perform all things in and by the instrument or guarantee mentioned on his part to be done and performed: that afterwards the banking Company did suffer and permit the said W. Courtney to, and he did open and keep a banking account with the said banking Company, and they then gave him credit on the same, and that, whilst he kept such banking account, he became indebted and liable to the banking Company in a large sum of money, to wit, the amount of the sum mentioned in the first-mentioned promissory note, for, by reason and on account of divers moneys paid, lent, and advanced by the said Company to, for and on account of the said W. Courtney, and of divers bills and notes discounted for and bearing the acceptance, signature, and endorsement respectively of the said W. Courtney, and otherwise, with interest, commission, and other usual banking charges thereon. And although the banking Company have done all things necessary, and all things and conditions have happened and been performed necessary, and all times have elapsed and passed necessary to entitle the banking Company to be paid the said last-mentioned sum of money by the said W. Courtney: Yet he has not paid the same, or any part thereof. And although the banking Company did all things necessary, &c., to entitle the banking Company to have their last-mentioned sum of money paid by the said W. Steward in his lifetime, and by the defendants *670] *as executors and executrix as aforesaid after his death: Yet the said W. Steward did not in his lifetime, nor have the defendants, as executors and executrix as aforesaid, since his death, paid the same, or any part thereof, but the same and the said first-mentioned promissory note, and each of them and every part thereof, still remains unpaid and due and owing to the banking Company, &c.

Pleas (inter alia).—Thirdly, to the first count: that the promissory note was made by the said W. Steward and by the said W. Courtney

jointly and severally, and before this suit the said W. Courtney satisfied the said note and all causes of action in respect thereof by payment. Fourthly, to the second count: that the said W. Steward did not promise as alleged. Fifthly, to the second count; that, before this suit, the said W. Courtney paid the said debts and liabilities in which he was so indebted and liable to the said banking Company, and all causes of action in respect thereof. Sixthly, to the whole declaration; that the alleged causes of action did not accrue within six years before this suit.—Issues thereon.

At the trial, before Martin, B., at the London Sittings after last Trinity Term, the following facts appeared.—In the year 1855, one William Courtney, being about to open an account with the Gloucestershire Banking Company, they required of him some security for moneys which they might from time to time advance to him, and he gave them a promissory note, dated the 4th December, 1855, whereby he and William Steward (the defendant's testator) jointly and severally promised to pay the banking Company 200*l.* on demand (which is the promissory note mentioned in the first count of the declaration). At the same time they signed and delivered to the banking Company the instrument or memorandum set out in the second count. The banking account was accordingly opened with W. Courtney, and, on the 31st December, 1855, he was indebted to the *banking Company upon it to the amount of 173*l.* 1*s.* 11*d.* No demand of [*671 payment was made, nor was any balance struck, until the 30th June, 1856, when 194*l.* 5*s.* was due from W. Courtney to the banking Company. A balance was afterwards struck every half year, the banking Company from time to time making advances to W. Courtney, and he from time to time paying money into the bank with which his account was credited in the usual way. The sums so credited exceeded 200*l.* The promissory note was never carried to the credit of Courtney in his account. The account continued until February, 1861, when it was closed with a balance due to the banking Company, of which a sum of 172*l.* remained due at the time this action was brought. The defendants were required to pay that amount, and, not having done so, this action was commenced on the 28th March, 1862, more than six years from the date of the note.

Upon these facts the learned Judge was disposed to think that the remedy on the note was barred by the Statute of Limitations, and that there was no contract apart from the note, inasmuch as the memorandum set out in the second count was only explanatory of the terms upon which the note was given; and his lordship directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for 172*l.*

Macnamara, in last Michaelmas Term, obtained a rule nisi accordingly, on the grounds, first, that the promissory note was taken out of the Statute of Limitations by part payments made by W. Courtney; secondly, that the document set forth in the second count of the declaration kept alive the remedy of the banking Company on the promissory note, and prevented the statute from running against it.

Collier (*Murch* with him) showed cause, in the present Term (Nov. 21).—The sole question is whether the plaintiff is entitled to recover

*672] the promissory note, for the *document set out in the second count does not amount to a contract, but is a mere memorandum of the terms upon which the note was given. The promissory note was not included in the account, and no payment was made in respect of it, but it was a mere security for whatever might be due from W. Courtney to the banking Company. [BRAMWELL, B.—Suppose the agreement had been to guaranty the payment of the balance from time to time due, and the account went on for ten years without any balance being struck, during which time it was sometimes in favour of the customer of the bank and sometimes against him, would the bank be barred by the Statute of Limitations from recovering the amount found to be due to them when the balance was struck?] The statute would run from the time the balance became due, not from the time it was first ascertained. Either nothing has been paid on account of the note, or the payments have satisfied it, and there is no agreement that it shall be revived whenever a balance is found due.

Macnamara, in support of the rule.—The manifest intention of the parties was that the promissory note and memorandum should be read together and constitute one agreement. There was no cause of action when the note was given, but only when an advance was made, and a new cause of action accrued upon each subsequent advance, otherwise the note would be no security. This case is not within the mischief contemplated by the Statute of Limitations, because so long as the account continues no presumption can arise that the note has been satisfied. [BRAMWELL, B.—According to the argument for the defendant, a cause of action arose when the first advance was made, but, when that was paid, all right of action on the note was gone for
*673] ever: whereas the very object of the note was to provide a security for a fluctuating balance.] *Irving v. Veitch*, 3 M. & W. 90,† is an authority in support of the proposition contended for. The judgment of the Exchequer Chamber in *Webb v. Spicer*, 13 Q. B. 894 (E. C. L. R. vol. 66), assumes that if the agreement and the promissory note had been between the same parties they would have formed one contract. If, in this case, the memorandum had been written on the back of the promissory note, the instrument could not have been declared on as a note, but would have been an agreement, and must have been stamped as such: *Leeds v. Lancashire*, 2 Camp. 205, *Cholmeley v. Darley*, 14 M. & W. 344.† The 14th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) does not apply to payment by a co-debtor before that Act: *Jackson v. Woolley*, 8 E. & B. 784 (E. C. L. R. vol. 92). There having been no direction as to the appropriation of the payments, it must be taken that they were made on account of the existing debt: *Hammersley v. Knowlys*, 2 Esp. 666.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This is an action by the public officer of the Gloucester Banking Company against the executors of one William Steward. The first count is upon a promissory note, dated the 4th day of December, 1855, made by the testator and one William Courtney, whereby they jointly and severally promised to pay the banking Company 200*l.* on demand. The second count is upon a special contract alleged to be contained in the instrument hereafter mentioned, and the breach is for non-payment of the money secured by the prom-

issory note. The important pleas are, the Statute of Limitations to the count upon the note, and non assumpsit to the second count.

*The facts were these:—In the year 1855, William Courtney proposed to open a banking account with the Gloucestershire Banking Company, and thereupon he and the testator, as his surety, executed to the Company the promissory note declared on, and at the same time an instrument in writing was signed by them and delivered to the banking Company. It was in the form of a memorandum, and was to the effect that the promissory note was given as a further and collateral security to the banking Company for the banking account intended to be kept by Courtney with them, and that it should be held by them, and they should be at liberty to recover thereon, to the full amount thereof, all the money which Courtney should at any time thereafter become indebted or liable to the banking Company on his banking account. The banking account was accordingly opened, and on the 31st December, 1855, Courtney was indebted to the bank upon it to the amount of 173*l.* 1*s.* 11*d.*, but no balance was then struck. The account was continued down to February, 1861, when it was closed with a balance due to the banking Company, of which a sum of 172*l.* is now due. The defendants were required to pay this balance, and, this not being done, this action was brought on the 28th March, 1862, more than six years from the date of the note. [674]

The cause was tried before my brother Martin at the sittings at Guildhall after last Trinity Term, when the learned Judge directed a nonsuit, with leave reserved to the plaintiff to enter a verdict. A rule for this purpose was obtained, and the case has been argued, and, after much consideration, we have arrived at the conclusion that the Statute of Limitations is not an answer to the first count. Had the security been in the form of a bond for 200*l.* and a defeasance to the effect of the memorandum, the operation and effect of the security would have been clear; and notwithstanding that the instrument is a promissory note payable on demand, which *primâ facie* indicates present existing liability enforceable without demand, and as to which the Statute of Limitations runs from the date, we think we are bound to read it and the memorandum together in order to ascertain the true meaning and character of the transaction. It is clear that, until an advance was made by the banking Company to Courtney, no action could have been maintained upon the note. Until then there would have been no consideration, and until there was consideration no action would be maintainable, and the Statute of Limitations only runs from the time when the cause of action accrued. The question, therefore, is, when did the cause of action accrue? And unless it accrued before the 2d March, 1856, the statute is no bar. It was contended before us that the statute began to run from the 31st December, 1855, by reason of the debt of 173*l.* 1*s.* 11*d.*, then due from Courtney, the customer, to the bank; but no balance was then struck, and certainly no claim was made by the bank upon the defendant's testator in respect of that debt; and we think that the mere existence of the debt, unaccompanied by any claim by the bank, would not have the effect of making the statute run from that date. [675]

Our judgment, therefore, is that the rule should be made absolute to enter the verdict for the plaintiff. Rule absolute.

*676]

*HALL v. LUND. Jan. 16.

In 1855, S., the owner in fee of two mills, leased one to P., who carried on therein the business of a bleacher. The refuse from his works was discharged through a drain, partly open and partly covered, into a natural stream or watercourse, 300 or 400 yards distant, and upon which the other mill was situate. This discharge of the refuse took place about seven times a fortnight and polluted the stream. In 1858, P. surrendered his lease, and S. granted a new lease to the defendant. In this lease the defendant was described as a "bleacher," and the demise was of the premises "late in the occupation of P." There was a clause that all buildings erected by the defendant for the purpose of bleaching should, at the end of the term, become the property of S. In 1858 the plaintiff purchased both mills. The defendant discharged the refuse from his works through the drain into the stream in the same manner that P. had formerly done. The plaintiff, who carried on in the other mill the business of a paper maker, brought an action against the defendant for polluting the stream.—Held, that the lease might be explained by the state of the premises at the time it was granted, and the mode in which they had been previously enjoyed; and that, thus explained, there was an implied grant by S. to the defendant to use the stream for the purpose of his business of bleaching, and therefore the plaintiff, who was in the position of S., could maintain no action against the defendant.

THE declaration stated, that the plaintiff was possessed of a mill and premises, called "Yew Tree Mill," situate at Diggle, in the county of York, and therein carried on the trade and business of a paper manufacturer, and by reason of his possession thereof the plaintiff was entitled to the flow of a stream or watercourse to, into, and through his said mill and premises, for the use and enjoyment of the same, and for the carrying on of his said trade and business thereon, without such fouling and pollution of the said stream or watercourse as hereinafter mentioned: Yet the defendant on divers days and times wrongfully and injuriously caused the said stream or watercourse to be fouled and polluted with fibrous matters, pulp, refuse, drugs, and other noxious materials, liquids, and fluids; and by reason thereof the said stream or watercourse ran and flowed to, into, and through the said mill and premises of the plaintiff in such foul and polluted state as aforesaid, whereby the plaintiff was greatly damaged in the use and enjoyment of his said mill and premises, &c.

Sixth plea.—That long before any of the said times, when, &c., and before the plaintiff had any estate, right, or title to the said mill and premises or any part thereof, to wit, on the 28th day of September, 1858, one Hugh Shaw, then being seised or possessed of the land *677] whereon the said mill and *premises have since been erected, with the appurtenances, for an estate not yet determined but still in force and existence, and being also then seised or possessed of a certain other mill, situate higher up the said stream or watercourse (hereinafter called the mill of the defendant), with the appurtenances, for an estate not yet determined but still in full force and existence, by deed demised and granted to the defendant the said mill of the defendant with the appurtenances, including a right to use the said stream or watercourse for the purposes of the said mill of the defendant and for carrying on there his, the defendant's, trade and business of a bleacher, for a certain term of years which has not yet elapsed, but which is still in full force and existence. And the defendant under and by virtue of that deed, before any of the said times, when, &c., entered and became and was possessed of the said mill of the

defendant with the appurtenances, and continued so thereof possessed until and at the said several times, when, &c.: that the grievances complained of were uses by the defendant of the rights, easements, and privileges so granted to him as aforesaid: that all the estate, right, and title of the plaintiff of, in, and to the land upon which the said mill and premises in the declaration mentioned were erected, were derived by the plaintiff under or by virtue of a grant or conveyance thereof from the said Hugh Shaw to the plaintiff, made after the execution of the said deed hereinbefore mentioned, and after the said entry by the defendant hereinbefore mentioned, and that the said mill in the declaration mentioned was erected by the plaintiff on the said land after such grant and conveyance as last aforesaid.—Issue thereon.

At the trial, before Wilde, B., at the last Yorkshire Summer Assizes, it appeared that the plaintiff, who was a paper maker, carried on his business at a mill, called "Yew Tree Mill," which was situate on a natural stream or *watercourse. The defendant, who was a bleacher, carried on his business at a mill, called "Ridge Mill," [*678 which was not situate on the stream but about 300 or 400 yards from it; and the water which he used in his business was not taken from the stream, but from another and independent source. After the water thus taken had been fouled by the process of bleaching, it was discharged into the stream, a little above the plaintiff's premises, by means of an artificial drain, partly open but covered up for several yards from the defendant's premises. This discharge of refuse water took place about seven times a fortnight, and caused the fouling of the stream of which the plaintiff complained.

On the part of the defendant it was proved that one Hugh Shaw was formerly the owner in fee of both the plaintiff's and the defendant's mill, and that in the year 1855 Shaw leased the defendant's mill to one Matthew Pullan, who carried on therein the business of a bleacher. In the year 1858, the defendant agreed to take from Pullan his business and premises, and, Shaw having assented to the arrangement, in the September of that year Pullan surrendered his lease to Shaw, and Shaw granted a new lease to the defendant.

By this lease, which was dated the 28th September, 1858, Shaw demised to the defendant (who was described as a bleacher), "all that messuage or tenement, with the garden, outbuildings, and closes or parcels of land therewith occupied, containing, with the said garden and land on which the said buildings are erected, 9 acres 1 rood, late in the occupation of Matthew Pullan and his undertenants, &c., with the appurtenances": habendum, "all and singular the before described premises, with the appurtenances," for the term of eleven years from the first of January then next. The lease contained a covenant by the defendant to repair and keep in repair all the interior of the said messuage, edifices, and buildings, &c., and also "all and singular the gates, *stiles, posts, rails, locks, goits, weirs, sluices, waterbanks, dams [*679 and reservoirs for water, hedges, ditches, mounds, ponds, trenches, and fences of and belonging to the said premises." The last clause in the lease was as follows:—"And lastly, it is expressly understood and agreed by and between the parties hereto, that all improvements, buildings, and erections made and built by the said lessee, his execu-

tors, &c., for the purpose of carrying on the business of bleaching, are at the end of the said term to become and be the property of the lessor, his heirs and assigns, although expressly erected for the said business."

In the following November, the defendant entered upon the premises under the lease, and carried on his business there in the same manner as Pullan had previously done. At the time Pullan quitted the mill, the premises, including the drain, were in precisely the same state as at the time this action was brought.

On the 4th of October, 1859, the plaintiff purchased of Shaw the fee simple in possession of the Yew Tree Mill, and the reversion in fee of the defendant's mill. In the year 1860, the plaintiff converted the Yew Tree Mill, which was formerly a silk mill, into a paper mill.

It was submitted, on behalf of the defendant, that the lease of the 28th September, 1858, contained an implied grant of a right to use the stream or watercourse for carrying on the business of a bleacher; and the learned Judge, being of that opinion, directed a verdict for the defendant on the sixth plea, reserving leave to the plaintiff to move to enter a verdict with 1s. damages; the defendant to be at liberty to amend the plea, if necessary, and the Court to have power to draw inferences of fact.

Monk, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that neither the lease to the defendant, nor the facts proved, supported the plea; against which

*680] *Bliss and W. R. Cole* now showed cause.—The plaintiff cannot be in a better position than Shaw, under whom he claims; and by the lease of the 28th of September, 1858, Shaw granted to the defendant a right to use the stream or watercourse for carrying on his business of a bleacher. A way appurtenant to land will pass with the land without any express grant: *Beaudeley v. Brook*, Cro. Jac. 189. So a conduit to a house over the land of the grantor will pass by a grant of the house cum pertinentiis: *Nicholas v. Chamberlain*, Cro. Jac. 121. Again, in *Pyer v. Carter*, 1 H. & N. 916,† it was held that where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and is subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose. In order to ascertain what passed to the defendant under the lease, regard must be had to the state of the premises at the time the lease was granted: *Hinchliffe v. The Earl of Kinnoul*, 5 Bing. N. C. 1 (E. C. L. R. vol. 35); *Roberts v. Karr*, 1 Taunt. 495. In *Blackesley v. Whieldon*, 1 Hare 176, 180, Sir J. Wigram, V. C., said: "The general principle of law, that where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute: (a) *Pomfret v. Ricroft*, 1 Saund. 320, and notes. And this principle is carried to the extent, that the implied grant entitles the lessee to whatever is necessary to the full enjoyment of the subject of the grant: *Senhouse v. Christian*, 1 T. R. 560." Here there is a demise of the premises, "late in the occupation of Matthew Pullan," and therefore all rights passed which Pullan enjoyed: Vin. Abridg. tit. *Grant* (Q).

(a) See Co. Lit. 55 a, 163 a; 3 Com. Dig. *Grant* (E. 10); 3 Burge Com. 416.

**Monk, Mellish, and Kemplay*, in support of the rule.—There is no implied grant of a right to foul the stream. The defendant does not claim an easement or a mere right to use the water, but to pollute it. [MARTIN, B.—It is not, strictly speaking, an easement, but a right to use the stream in the manner in which it was enjoyed at the time the lease was granted.] Such a right can only be claimed where the user has been apparent and continuous: *Gale on Easements*, p. 85, 3d ed. [CHANNELL, B.—In *Ewart v. Cochrane*, 4 Macq. Sc. App. 117, the House of Lords confirmed the principle of the decision in *Pyer v. Carter*.] In those cases the question was not, as here, whether the occupier of one tenement had a right to foul a stream so as to create a nuisance to his neighbour, but whether the one could deprive the other of a servitude which was essential to the enjoyment of his property. In both those cases the easement upon the servient tenement was apparent and continuous, and a great deal turned on what evidence was admissible for the purpose of showing a grant. Here nothing can be looked at except the terms of the lease and the apparent state of the premises at the time it was granted, and it is not competent to inquire how they have been used. [MARTIN, B.—In ascertaining what passed by a conveyance evidence may be given of the state of the property at the time it was conveyed, and of the mode in which it had been enjoyed. Here the lessee sees a drain, and he naturally assumes that some use has been made of it: the refuse must be got rid of, and surely evidence may be given that the drain was reasonably necessary and had been used for that purpose.] Whatever inference may be drawn from an inspection of the premises may be made; but the easement must be apparent on the face of the premises. [POLLOCK, C. B.—In *Ewart v. Cochrane*, Lord Campbell, C., said: “But the ground on which I proceed is this, that this is a *servitude which the grant implies. I cannot entertain the slightest doubt upon that. I mean the grant accompanied with the enjoyment which existed at the time the grant was made.” MARTIN, B.—In *Phear on the Rights of Water*, p. 73, it is laid down that “whenever the owner of land divides his property into two parts, granting away one of them, he is taken, by implication, to include in his grant all such easements over the remaining part as are necessary for the reasonable enjoyment of the part which he grants in the form which it assumes at the time he transfers it. If the grantor has already treated this portion as separate property, the mode in which he enjoyed it, or allowed it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it.” In *Gale on Easements*, p. 85, 5th ed., it is said, that by apparent easement must be understood “not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject.” That observation was cited and approved by the Court in *Pyer v. Carter*, 1 H. & N. 922.† There was no evidence that Shaw was aware of the mode in which Pullan had used the stream. General words in a lease, such as “appertaining,” “belonging,” will not, upon a severance of a tenement, pass such a right as that now claimed: *Dodd v. Burchell*, 1 H. & C. 113,† *Gale on Easements*, p. 77, 5th ed. In *Wardle v. Brocklehurst*, 1 E. & E. 1058, 1065 (E. & C., vol. 1.—26

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C. L. R. vol. 102), the farm was conveyed together with "all waters, watercourses, easements, and appurtenances belonging to, or held, used, occupied or enjoyed therewith." Here there is no implied grant by Shaw to the defendant to pollute the water.

*688] POLLOCK, C. B.—I am of opinion that the rule ought to *be discharged. The question is, what rights passed to the defendant under the lease granted to him. Pullan, the previous lessee, had carried on the business of a bleacher upon the premises in question, and when he surrendered his lease a new lease was granted to the defendant of the same works and premises for the purpose of bleaching. I cannot conceive why there should be any difference, either on technical or common sense grounds, between an assignment of a lease by a lessee with the concurrence of the lessor, and a surrender of a lease by a lessee and grant by the lessor of a new lease of the same premises. If Pullan had assigned his lease to the defendant, it is clear that all rights would have passed to him which Pullan possessed under that lease, and it seems to me that there is no distinction between that case and the surrender of the lease and the grant of a new lease to the defendant.

It has been argued that no apparent easement was granted by the lease, and that the previous mode of user of the premises cannot be inquired into; but I think that we are at liberty to ascertain the mode in which the premises had been enjoyed by the former lessee; their enjoyment as bleaching works being the object intended by the lessor in granting the lease. It is conceded that the former lessee used this stream for the purpose of carrying off his refuse, and I cannot see any difference between that case and taking water from a stream, and returning it in a foul condition. It is said that it is turning a watercourse into a drain, but in one sense all watercourses operate as drains. But, however that may be, the lessor, with full knowledge of the mode in which the premises had been used by the former lessee, grants to the defendant a new lease of the premises for the same purpose: and the plaintiff, who purchased the reversion, stands in the same position as the lessor, and cannot derogate from his own grant.

*684] *MARTIN, B.—I am of the same opinion. Shaw could grant to the plaintiff no more right than remained to him after his lease to the defendant; therefore it is necessary to ascertain what Shaw granted to the defendant. As a general rule, in considering what is granted by a lease, the parties have a right to prove all the circumstances connected with the state of the property at the time of the demise. Therefore I think that it was competent to the defendant to show that these premises were leased to him for the purpose of bleaching, and that the refuse had been usually carried away by means of this stream. If, as suggested by Mr. *Kemplay*, there had been some concealed mode whereby the former lessee got the use and benefit of the stream without the knowledge of the lessor, the case might assume a different complexion; but the circumstance that the lessor allowed the former lessee to discharge his refuse into the stream is a fact to be proved, and, that being proved, there is no doubt as to what was granted by the lease. Mr. *Bliss* pointed out that the demise was of the premises as in the occupation of Pullan. That might carry the

case a little further; but I desire to rest my judgment on the decision of the House of Lords in *Ewart v. Cochrane*, 4 Macq. Sc. App. 117, that where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights. It is not necessary to consider what is appurtenant or what is not appurtenant,—there is the decision of the House of Lords to the effect which I have stated. This may not be an easement in the strict sense of the term, but it is in point of fact a grant of a right, for that which Shaw granted to the defendant was the premises and bleaching works as they existed at the time Pullan surrendered his lease. I therefore think that our decision is both consistent with good sense and justice, and fully borne out by *Ewart v. Cochrane*.

*CHANNELL, B.—I am also of opinion that this rule ought to be discharged. The right claimed by the defendant is not [*685 strictly speaking an easement, but a right founded on a particular grant; and therefore, in order to ascertain what was granted, we must look at the mode in which the premises were enjoyed at the time of the grant. If this had been a secret use of the stream of which the lessor had no knowledge whatever, that might have altered the case, as my brother Martin observed, but there is nothing to lead to that conclusion; and I found my judgment on the fact that Shaw knew of the discharge of the refuse water into the stream.

It is said that there was no continuous user of the stream, but I cannot attach any weight to that argument. In order to be continuous, the user need not be on every day in the week; and there was clearly a continuous user when the refuse was discharged into the stream, on an average, seven times a fortnight. I should have come to the same conclusion independently of authority, but the case of *Pyer v. Carter*, which was confirmed and its principle explained by the House of Lords in *Ewart v. Cochrane*, compels me to come to this conclusion.

WILDE, B.—I agree with the rest of the Court; but I by no means mean to say that in every case of a new demise the premises may be used with all the liberties and privileges enjoyed by the former lessee. It seems to me that, in case of implied grant, the implication must be confined to a reasonable use of the premises for the purpose for which, according to the obvious intention of the parties, they are demised. Some uses are obvious enough. A demise of a brewery would carry with it the right to use the premises for brewing; although that might be a nuisance to the lessor or his assigns. So, if a mill were demised the *lessee would have a right to grind there, although [*686 the noise might annoy the lessor or his assigns. If so, why, in the case of a demise of bleaching premises, may there not be an implied grant that they may be used, as they have been theretofore used, for the purpose of bleaching? Each case must depend on its own circumstances and the intention of the parties, to be ascertained from the character, state, and use of the premises at the time of the grant, and in this case there is no doubt of the intention of the parties to be derived from the existing circumstances.

Rule discharged.

JOHN METTERS *v.* BROWN. Jan. 31.

In ejectment by the plaintiff, as administrator of his mother, it appeared that she had been in possession of the land sought to be recovered from the year 1818 until her death, and in order to rebut the presumption of a seisin in fee, the plaintiff, after evidence of the loss of the original, gave secondary evidence of an assignment to his mother of the premises in question for the remainder of a term of ninety-nine years, subject to two lives; but there was no evidence of the creation of the term. It also appeared that the plaintiff had, in his mother's lifetime, mortgaged the premises to a person whose interest vested in the defendant.

Held.—First, that there was evidence for the jury of the existence of a term, and that they might presume that the possession of the plaintiff's mother was referable to that term and not to a seisin in fee.

Secondly, that the plaintiff was not estopped by his mortgage in his mother's lifetime from setting up the term.

EJECTMENT to recover possession of meadow ground and two cottages, &c., situate at Beaworthy, in the county of Devon.

At the trial before Williams, J., at the last Devon Summer Assizes, the plaintiff, who claimed as administrator of his mother, Elizabeth Metters, proved that from the year 1818 until her death in 1847 she was in possession of the land in question; and that about forty years ago she built two cottages upon it, in one of which she lived up to the time of her death, and the other she let to successive tenants who *687] paid her rent. The plaintiff also proved that *about twenty-five years ago his cottage was destroyed by fire, when the deed under which his mother held the premises was burnt. Evidence was then given of the execution and attestation of the deed, and that it was an assignment by one Thomas Metters to the plaintiff's mother of a lease granted in 1798 by the guardian of Sir A. Molesworth, an infant, to one Richard Metters for a term of ninety-nine years, subject to two lives. A draft of this lease was produced, and it was proved that search had been made in the proper quarters, but neither the original or a counterpart could be found. Entries were produced, in the handwriting of a deceased steward of Sir A. Molesworth, of the receipt of rent in 1801 and the four following years from Richard Metters for the premises in question, in which they were described as held for two lives. In June, 1861, the plaintiff obtained letters of administration to his mother's effects.

The defendant proved that the plaintiff in the year 1844, in his mother's lifetime, had executed a mortgage in fee of the premises in question to one Jago. The mortgage-deed contained a covenant by the plaintiff, in the usual form, that he had good title and right to convey. It was admitted that the interest of Jago in the premises in question had vested in the defendant; and that the plaintiff had three sisters, children of his mother.

It was objected, on behalf of the defendant, first, that the plaintiff had not shown any title in himself, inasmuch as, his mother having been in possession in her lifetime, the legal presumption was that she was seised in fee, and there was no sufficient evidence that she held under a lease for years: secondly, that the plaintiff was estopped by his mortgage to Jago from claiming title under a lease for a term of years. A verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

*688] **Collier*, in the present Term, obtained a rule nisi accordingly; against which

Montague Smith (C. A. Turner with him) showed cause (Jan. 24).—First, there was evidence that the plaintiff's mother was possessed of the premises in question for a term of years, determinable on lives, which has vested in the plaintiff as her administrator. It appeared that she had built two cottages on the land, one of which she occupied and the other she let, and thereupon it was objected that the legal presumption was that she was seised in fee. But that presumption was rebutted by evidence that she was possessed of a chattel interest only. It is true neither the deed creating the term nor the assignment were produced, but their non-production was accounted for, and secondary evidence given of their contents. [MARTIN, B.—How can it be said that there was no evidence for the jury?] Assuming that there was evidence of the existence of a term, it vested with plaintiff as administrator. By the Statute of Frauds, 29 Car. 2, c. 3, s. 12, an estate per autre vie, where there is no devise and no special occupant thereof, shall go to the executors or administrators of the party who had the estate thereof by virtue of the grant, and shall be assets in their hands: (a) Williams on Executors, vol. 1, p. 603, 5th ed.

Secondly, the plaintiff, who claims as administrator of his mother, is not estopped by his mortgage in her lifetime from setting up the term. Though an estoppel may bind a party who claims in one character, it will not have that effect where he claims in a different right. Thus, where an executor de son tort verbally agreed with the landlord of the intestate to deliver up the premises demised, and afterwards took out letters of administration, it was held that he *was not concluded from bringing an action of ejectment against the [*689 landlord who had actually obtained possession under the agreement: Doe d. Hornby v. Glenn, 1 A. & E. 49 (E. C. L. R. vol. 28). In Middleton's Case, 5 Rep. 28 b, it was adjudged "that an executor before probate might release an action although before probate he could not have an action, for the right of the action is in him; but if A. releases and afterwards takes administration, it shall not bind him, for the right of the action was not in him at the time of the release." So a party suing as executor, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sued as administrator; but he may show that the letters of administration have since been repealed: Robinson's Case, 5 Rep. 32 b. In Com. Dig. tit. *Estoppel* (C.), it is said;—"So an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir of his mother." [CHANNELL, B.—A declaration made by a person who afterwards assumes and is sued in the character of administratrix cannot be used as an admission made by a party in the cause, although she may combine the character of cestui que trust with that of administratrix: Legge v. Edmonds, 25 L. J. Chan. 125.]

Collier and *Kingdon*, in support of the rule.—First, the plaintiff has failed to prove that there was an outstanding term in his mother, which has vested in him. There is no evidence of the creation of a term by the owner in fee. [POLLOCK, C. B.—The plaintiff's mother was shown to have been in possession of the land.] That raised a presumption that she was seised in fee. There was secondary evi-

(a) There is a similar provision in the Act for the amendment of the laws with respect to wills: 7 Wm. 4 & 1 Vict. c. 26, s. 6.

dence of an assignment by Thomas Metters to the plaintiff's mother *690] of a lease granted in 1798, but there was no *evidence that she held the premises in question under that lease. It was not shown that Thomas Metters was ever in possession, or that he derived any title from Richard Metters, who in 1801 had paid rent to Sir A. Molesworth. [MARTIN, B.—There was evidence of an assignment to the plaintiff's mother of a lease for years, subject to lives, and a jury might infer that the mother's possession was referable to that lease and not to a seisin in fee.] It was not shown that the assignment was made by a person who had a right to make it.

Secondly, the plaintiff is estopped from setting up the term. In general, a mortgagee is estopped from denying the title of his mortgagor. A mortgagor is equally estopped, as between himself and his mortgagee, from setting up the title of a third person: *Doe d. Ogle v. Vickers*, 4 A. & E. 782 (E. C. L. R. vol. 31). Then, does it make any difference that the plaintiff is suing as administrator of his mother? It is submitted that it does not. Suppose his mortgagee had brought ejectment against him in his mother's lifetime, *Doe d. Ogle v. Vickers* is an authority that he could not have set up his mother's title as against the mortgagee. The plaintiff is bound to prove that there was an outstanding term in his mother, and that it vested in him as her administrator; but the moment he proves the first proposition he is as much estopped from setting up the term as he would have been in his mother's lifetime. In taking out administration, the plaintiff was a mere volunteer. He has also a beneficial interest as one of the next of kin, and to that extent at least he is estopped. In *Doe d. Hornby v. Glenn*, 1 A. & E. 49 (E. C. L. R. vol. 28), the agreement was not under seal, and that case may be supported on the ground that it was not a valid surrender within the Statute of Frauds. In a note to *Middleton's Case*, 5 Rep. 28 *b*, its authority is doubted, and reference is made to *Whitehall v. Squire*, 1 Salk. 295, where the *691] *majority of the Court held that an administrator cannot bring trover for a chattel after his consent, before administration granted, that the defendant should have it. [MARTIN, B.—There the plaintiff agreed that the defendant should keep the chattel in part satisfaction of the expense he had incurred in burying the intestate. CHANNELL, B.—That case is thus explained in *Williams on Executors*, vol. 1, p. 355, 5th ed.:—"The principle, however, of this decision appears to have been, that the plaintiff, being a particeps criminis in the very act of which he complained, should not be permitted to recover upon it against the person with whom he colluded."] In *Smith v. Morgan*, 2 Moo. & R. 257, Tindal, C. J., ruled that the declarations of a party suing as a representative of others, made before he became such, are evidence. [POLLOCK, C. B.—In that case the plaintiff, on whose behalf the objection was taken, obtained the verdict, so that there was no necessity for questioning the law as laid down by Tindal, C. J. In *Fenwick v. Thornton*, Moo. & M. 51 (E. C. L. R. vol. 22), Abbott, C. J., ruled that the declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him.]—They also referred to *Pickard v. Sears*, 6 A. & E. 469 (E. C. L. R. vol. 33). *Our. adv. vult.*

CHANNELL, B., now said.—This was an action of ejectment, which

was tried before my brother Williams at the last Devonshire Summer Assizes, when a verdict was found for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit.

The action was brought to recover possession of a piece of land, consisting of about an acre and a half upon which two cottages and some outhouses were built. The plaintiff *sued as administrator of his mother, and he sought to recover the premises in [*692 question by reason of a term of which it was said his mother died possessed, and which devolved upon him as her administrator, and continued to subsist at and after the time when the action was brought. Administration had not been taken out by the plaintiff until nearly fourteen years after his mother's death; and the defence was that the defendant had been in possession of the premises under a mortgage, dated the 9th January, 1844, by the plaintiff, in his mother's lifetime, to one Jago, whose interest had vested in the defendant. Two objections were made by the defendant to the plaintiff's right to recover: first, that there was no evidence on the part of the plaintiff to establish the existence of the term; and secondly, assuming that there was, the plaintiff was estopped from setting it up by reason of the mortgage.

The first question, therefore, is whether there was any evidence of the existence of a term. It appeared that the plaintiff's mother in her lifetime was in possession of the land; that she built upon it two cottages, in one of which she lived, the other she let, and received the rent. There was, therefore, evidence from which it would be presumed that she was seised in fee, unless her title was cut down or explained. It was necessary for the plaintiff to rebut the presumption of a seisin in fee, and show that his mother had only a chattel interest for a term which subsisted at and after the commencement of the action. No deeds were produced, and in order to account for their non-production the plaintiff proved that about twenty-five years ago his cottage was destroyed by fire, when the deed under which his mother held the premises was burnt. Parol evidence was then admitted to show what interest the plaintiff's mother took; and it appeared that she had an assignment of a lease *granted in 1798, for a term of 99 years, [*693 subject to two lives. A draft of that lease was produced, and it was proved that search had been made in the proper quarters for the original or a counterpart, but neither could be found. No objection was made to the admissibility of the parol evidence, and therefore the case is the same as if deeds had been produced tallying with that evidence. It is true that one witness stated that the term of 99 years was subject to three lives, but that in our view makes no difference. It was said by the defendant's counsel, and truly, that there was no evidence of the creation of the original term of ninety-nine years, but it was proved that the steward of the Molesworth family had received from Richard Metters rent in respect of the premises in question, and it is impossible to deny that the enjoyment of them by the plaintiff's mother was a rightful enjoyment under the assignment of which parol evidence had been given. It therefore seems to us that there was evidence that a term of years existed; and that removes the first objection.

The second point is whether, assuming there was evidence of an

existing term, the plaintiff, as administrator of his mother, is estopped by his mortgage of the premises in her lifetime from setting up that term. We think he is not. In *Doe d. Hornby v. Glenn*, 1 A. & E. 49 (E. C. L. R. vol. 28), which was cited on the argument, it was held that an agreement entered into by an executor de son tort did not bind him after he had become rightful administrator. In our opinion the plaintiff, who sues as administrator of his mother, must be considered in the position of a stranger, and therefore the rule as to estoppel does not apply; for whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger. The authorities on the subject are not very distinct, but reference may *694] be made to Com. Dig. *Estoppel* (C), where it is laid down, that generally a stranger shall not be bound by an estoppel.

For these reasons we think that the rule ought to be discharged.

Rule discharged.

MARIA HOWARTH v. BROWN. Jan. 16.

Where a defendant pleads a matter of defence which in fact arose after the last pleading, the plaintiff may, under 23 Reg. Gen. T. T. 1853, confess the plea and sign judgment for his costs, although it contains no allegation that the matter of defence arose after the last pleading.

THIS was an action against the acceptor of two bills of exchange, and on accounts stated. The declaration was delivered on the 26th October, and the defendant then pleaded to the counts on the bills, a denial of the acceptance, and to the count on accounts stated, never indebted. On the 17th November, the defendant obtained a Judge's order for leave to withdraw those pleas, and plead a defence under the 164th section of The Bankruptcy Act, 1861.

On the 18th November the defendant accordingly pleaded as follows:—"And the defendant says, that he was duly adjudged a bankrupt, and that afterwards, and after the commencement of this action, he passed his final examination and obtained his order of discharge: that the bills were drawn and accepted by the defendant as a security for a debt due from him and provable under the bankruptcy, and were made and accepted, and the causes of action in the declaration mentioned accrued, pending the proceedings in such bankruptcy; and the consideration for the acceptances was the said debt so provable, and no other consideration; and the said accounts stated were stated of and concerning the money payable under the said bills."

On the 1st of December, the plaintiff delivered the following replication:—"The plaintiff confesses the truth *of the matters *695] contained in the said plea of the defendant by him above pleaded after the last pleading herein, and she prays judgment for her costs of suit in this behalf." On the 4th of December, the plaintiff signed judgment for her costs. The defendant then took out a summons at Chambers to set aside the judgment, which was heard before Martin, B., who referred the matter to the Court.

C. Pollock now moved for a rule calling on the plaintiff to show cause why the replication or confession, and the judgment signed thereon, should not be set aside for irregularity.—Under the old

practice, on a plea puis darrein continuance the plaintiff was entitled to discontinue his action without payment of costs: *Woollen v. Smith*, 9 A. & E. 505 (E. C. L. R. vol. 36), but there is no case which decides that a plaintiff who abandons his action can sign judgment for his costs. [MARTIN, B.—The 69th section of the Common Law Procedure Act, 1852, provides that where a plea puis darrein continuance has heretofore been pleadable, “the same defence may be pleaded, with an allegation that the matter arose after the last pleading.” Then by rule 23: “When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea.” A form of a confession and judgment is given in Chitty’s Forms, p. 462, 9th ed.] The 23d rule must be read in connection with the 22d.(a) This case is not within rule 22, because it is not pleaded *with other pleas; and [*696 it is not within rule 23, because there is no allegation that the matter of defence arose after the last pleading. [WILDE, B.—Unless the plaintiff signs judgment for his costs, how is he to get them?] He should have gone to trial: *Cook v. Hopewell*, 11 Exch. 555.† [MARTIN, B.—All that case decides is, that the plaintiff was not bound to confess the plea, when it was untrue, and he had not accepted the sum paid to him in satisfaction of his costs.]

POLLOCK, C. B.—I am of opinion that there ought to be no rule. If the 22d and 23d Rules of Trinity Term will admit of any construction by which the plaintiff may obtain her costs, we ought to put that interpretation upon them. It is not denied that if the plaintiff went to trial, and it turned out that the plea was a good defence to the action, she would get her costs up to the time when it was pleaded; but it is contended that if she simpliciter confesses the plea to be a good defence, she is not entitled to any costs. In my opinion it would be inconsistent and discreditable to administer the law in such a way.

MARTIN, B.—I am of the same opinion. Reading the 69th section of the Common Law Procedure Act, 1852, together with the 22d and 23d Rules, the case is plain. Under the old law, if a defendant pleaded a defence puis darrein continuance, that operated as a withdrawal of all the other pleas; and the defence rested on that plea alone. If the plea was true the plaintiff could not go to trial, but was obliged to confess it. He could get no costs, because, under the Statute of Gloucester, 6 Ed. 1, c. 1, there must be a judgment to entitle a plaintiff to costs. But ordinary justice points out that, if a defendant is liable to an action at the time it is brought but has subsequently an answer to *it, the plaintiff ought to have his costs [*697 up to that time. And, accordingly, the Rules referred to have attempted to put the practice on a reasonable foundation. The Court of Queen’s Bench had decided that matter of defence which arose after action brought could not be pleaded together with matter of defence which arose before action brought.(b) The 22d rule was

(a) Rule 22.—A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defence arising before the commencement of the action: provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea.

(b) *Suckling v. Wilson*, 4 D. & L. 167.

framed for the purpose of obviating that, and it says that, "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action." But, inasmuch as the plaintiff, if he admitted the facts contained in the plea, ought to have his costs up to the time it was pleaded, the rule goes on to provide "that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea." Then comes the 23d Rule, which applies to this case. That rule provides, that if a defendant shall plead a matter of defence which arose after the last pleading, the plaintiff shall be at liberty to confess the plea, and shall be entitled to his costs up to the time it was pleaded. That is simply carrying out the same principle as the 22d Rule. No doubt the plea ought to contain an allegation that the matter of defence arose after the last pleading, and but for the license in pleading now allowed, it must have been so alleged; but, however that may be, this is, in substance, the old plea of *puis darrein continuance*, which was pleaded when matter of defence arose after plea or continuance; if it arose before plea or continuance, it was pleaded to the "further maintenance" of the action.

But then it is said that the plaintiff might have obtained his costs costs by going to trial, and *Cook v. Hopewell*, 11 Exch. 555,† has *698] been cited as an authority for that position. But that case is very different from this. There the plea alleged that the defendant paid, and the plaintiff accepted, a certain sum in satisfaction of the debt *and all damages* accrued in respect thereof; upon which the plaintiff took issue. Therefore the question to be tried was whether the plaintiff did accept that sum in respect of the debt *and damages*. My brother Wightman thought that the 22d rule applied, and that the plaintiff, instead of going to trial, ought to have confessed the plea and signed judgment for his costs, and he directed a verdict for the defendant. The question was, who was entitled to the verdict upon that issue; that is, who was right upon the matter of fact. It was clear that the plaintiff had not accepted the money in satisfaction of his costs, and therefore my brother Platt, my brother Bramwell, and myself considered that the plaintiff was entitled to a verdict with 1s. damages. I there stated, as I now state, that the 22d Rule has no application to the issue raised in that case.

CHANNELL, B.—I am entirely of the same opinion. Reading the 22d and 23d Rules together, I entertain no doubt whatever upon the point now raised. I agree with my brother Martin that the case of *Cook v. Hopewell* is clearly distinguishable from this case.

WILDE, B.—I am of the same opinion, and I will only add that I am glad that the Court, on a matter of practice, can arrive at a conclusion so consonant with reason and justice. Rule refused.

*COCKRILL v. SPARKES. Jan. 29.

[*699]

In 1853, H., as principal, and the defendant as surety, gave to the plaintiff their joint and several promissory note for payment of 200*l.* on demand. In 1861, H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter:—"I hereby consent to your receiving the dividend under H.'s assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received the dividend, and in 1862 sued the defendant for the balance of the promissory note.

Held: first, that the letter was not an acknowledgment of the debt, so as to take the case out of the Statute of Limitations.

Secondly, that the letter, coupled with the payment, did not render it more than "only payment" by a co-debtor, so as to take the case out of the 14th section of the Mercantile Law Amendment Act, 1856.

DECLARATION on a promissory note dated the 9th of November, 1853, whereby the defendant promised to pay to the plaintiff, on demand, 200*l.*, with interest at 5*l.* per cent.

Plea (inter alia), the Statute of Limitations.—Issue thereon.

At the trial, before Martin B., at the Middlesex Sittings, after last Trinity Term, it appeared that on the 9th of November, 1853, the defendant signed the promissory note (which was a joint and several note), as surety for one Henry Hilder, who received the proceeds. In the year 1861, Hilder was in pecuniary difficulties, and assigned all his property for the benefit of his creditors. In April of that year, the plaintiff requested the defendant to sign a document, which he stated was necessary to enable him to receive certain dividends under Hilder's assignment, and the defendant accordingly signed the following document. (57)

"Mr. Charles Cockrill,

"Sir,—I hereby consent to your receiving the dividend under Mr. Henry Hilder's assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt.

"Yours, &c.,

SETH SPARKE.

"5th April, 1861."

The plaintiff afterwards received a dividend amounting *to 39*l.* 14*s.* 1*d.*, and he also received goods to the amount of 58*l.* 18*s.* 6*d.*, leaving 101*l.* 7*s.* 5*d.* due to him on the note. The writ issued on the 6th March, 1862. [*700]

It was submitted, on behalf of the defendant, that there was no payment on account, or acknowledgment of the debt, to take the case out of the Statute of Limitations. The learned Judge directed a verdict for the plaintiff for the amount claimed, reserving leave to the defendant to move to enter a verdict for him.

Beresford, in last Michaelmas Term, obtained a rule nisi accordingly; against which

H. T. Cole showed cause in the present term (Jan. 12).—First, the letter of the 5th of April, 1861, was a sufficient acknowledgment, within the 9 Geo. 4, c. 14, s. 1, to take the debt out of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3. The letter clearly admits that some debt was due from the defendant to the plaintiff, and extrinsic evidence was admissible to show that it related to the debt due on the promissory note. The case is distinguishable from *Smith v. Thorne*, 18 Q. B. 134 (E. C. L. R. vol. 83); for there the letter contained no

absolute acknowledgment of a debt, nor unqualified promise to pay, but merely expressed a hope that in a certain event it might be paid. [MARTIN, B.—Is not the meaning of the letter this:—"As the receipt of the dividends might prejudice your right against me as a surety, I hereby agree that your receiving them shall not prejudice your claim against me"? POLLOCK, C. B.—The letter merely amounts to this: "By receiving the dividends, you shall not be prejudiced in any claim which you may have against me."] The plaintiff could not be prejudiced if no debt was due to him, and therefore the letter must amount to an admission that some debt is due. [MARTIN, B.—The *701] acknowledgment must be *such that a promise to pay on request may be inferred from it. POLLOCK, C. B.—It is now sought to use the letter for a purpose not contemplated either by the person who wrote it or the person who asked for it.]

Secondly, the payment of the dividend would, before the "Mercantile Law Amendment Act, 1856" (19 & 20 Vict. c. 97), have been sufficient to take the case out of the Statute of Limitations; and the 14th section of that Act merely provides that a co-debtor shall not lose the benefit of the Statute of Limitations "by reason only of payment" of principal or interest by another co-debtor. Here there is a payment coupled with an acknowledgment of the debt, so that the cause is not within the 14th section of the "Mercantile Law Amendment Act, 1856."

Beresford, in support of the rule.—First, the defendant's letter does not amount to an acknowledgment of the debt, so as to take the case out of the Statute of Limitations. It is only an agreement that the receipt of dividends from the principal debtor shall not prejudice the plaintiff's rights against the defendant, as surety.—Secondly, the letter has not altered the effect of the payment. It is simply a payment by a co-debtor, which, before the Mercantile Law Amendment Act, 1856, would have prevented the operation of the Statute of Limitations: *Whitcomb v. Whiting*, Doug. 652. It is clear that unless the letter amounts to an acknowledgment of the debt, there was payment *only* by a co-debtor within the meaning of the 14th section of the Mercantile Law Amendment Act, 1856.—He also referred to 1 Smith's Leading Cases 557, 5th ed., and *Jackson v. Woolley*, 8 E. & B. 778 (E. C. L. R. vol. 92). *Cur. adv. vult.*

The judgment of the Court was now delivered by

*702] *WILDE, B.—This is an action upon a promissory note payable on demand, made by one Hilder, being the principal, and the defendant as surety, and dated more than six years before the commencement of the action. There was a plea of the Statute of Limitations, and in order to take the case out of the Statute, it was proved that such was the relation of the parties; and that in the year 1861 Hilder became insolvent, and proposed to pay a composition to his creditors, and that thereupon the defendant, on the 5th of April, of that year, wrote and signed a letter to the plaintiff as follows: "I consent to your receiving a dividend under Hilder's assignment, and I do agree that your so doing shall not prejudice your claim on me for the same debt." The dividend was paid, and this action was brought to recover the balance.

It was contended: first that the letter took the case out of the

statute. We do not concur in this construction. An acknowledgment of a debt, to have the effect, must be one from which a promise to pay the debt may reasonably be implied, but there is nothing in this letter to lead to such implication. It was obviously written with an entirely different object, viz., to prevent any release of the defendant as surety by reason of the receipt of a dividend from the principal debtor, and discharging him from the residue; but there is nothing in the letter to show that the defendant proposed to do more. The receipt of the dividend was not to prejudice the plaintiff's claim, but the letter shows no new contract or fresh liability.

But it was contended: secondly, that the payment of the dividend and the letter, together, took the case out of the statute. Upon the original construction of the Statute of Limitations, it was decided that a part payment by one of several joint, or joint and several, debtors kept alive or revived the remedy against the other, although the latter *was a surety only, and even although the payment was not made until the statute had run out. The cases will be found [703 referred to in Chitty upon Contracts, 5th ed., 733, and this must be taken as indisputable law. Then came Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 1, which enacted that nothing therein contained should alter or lessen the effect of any payment of principal or interest made by any person. The law therefore remained unaltered, but by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 14, it is enacted that where there shall be two or more joint debtors, no co-debtor shall lose the benefit of the Statute of Limitations so as to be chargeable by reason *only* of payment by any other co-debtor.

The letter above set out has already been construed by the Court, and does not appear to us to carry the matter further than a "payment only" by the co-debtor.

The last statute therefore applies, and the defendant is entitled to the benefit of the Statute of Limitations.

The rule will, therefore, be absolute to enter the verdict for defendant.

Rule absolute.

FLIGHT v. REED. Jan. 21.

Bills of exchange given after the repeal of the usury law, in renewal of bills given while that law was in force, to secure payment of money lent with usurious interest, are valid, the receipt of the money being a sufficient consideration to support a new promise to pay it.—Per Pollock, C. B., and Wilde, B. Dissentiente Martin, B.

DECLARATION on six bills of exchange, drawn in the years 1855 and 1856, by the plaintiff upon and accepted by the defendant.

Plea.—That before the making of the said bills of exchange in the declaration mentioned, or any or either of them, to wit, on the 31st day of October, A. D. 1845, it was *corruptly and against the form of the statute in that behalf made and provided, agreed [704 between the plaintiff and defendant, and one Robinson, that the plaintiff should lend and advance to the defendant and the said Robinson a certain sum of money, to wit, 1500*l.*, and that the plaintiff should forbear and give day of payment to the defendant

and the said Robinson, until a day then to come, to wit, until the bills of exchange next hereinafter mentioned should become due and payable, and that for such forbearance the defendant and the said

Robinson should pay to the plaintiff more than lawful interest at the rate of 5% per centum per annum, upon the said sums of money so lent and forborne by the plaintiff to the defendant, that is to say 100%. And that for securing the repayment of the said sum of 1500% and interest, the defendant and the said

Robinson should accept and deliver to the plaintiff certain bills of exchange, drawn by the plaintiff upon them, whereby they should engage to pay to the plaintiff or his order 1600%, ten weeks after the date thereof and of the said loan. And the defendant further says, that in pursuance of the said unlawful agreement the plaintiff accordingly, to wit, on the day and year aforesaid, made the said loan and advance to the defendant, and the said Robinson, and they

then accordingly accepted bills of exchange, drawn by the plaintiff on them for the sum of 1600%, payable as aforesaid. And that save as aforesaid there never was any consideration for the acceptance by the defendant of the said last-mentioned bills of exchange, or any or either of them. And the defendant further says that the said bills were dishonoured at maturity, and that the bills of exchange in the declaration mentioned were accepted and given, after the passing of the statute 17 & 18 Vict. c. 90, by way of renewal of the said other bills of exchange, to secure the payment to the plaintiff of the money *705] secured by the said other bills of exchange so given to the plaintiff as aforesaid, including the said sum of 100% heretofore mentioned, and in the said other bills included as interest as aforesaid; and that save as aforesaid there never was any value or consideration for the acceptance by the defendant of the bills of exchange in the declaration mentioned, or any or either of them.

Demurrer, and joinder therein.

Lush (Philbrick with him), in support of the demurrer.—The 3 & 4 Wm. 4, c. 98, s. 7, exempted from the operation of the usury law, bills of exchange and promissory notes payable at or within three months after date. The 7 Wm. 4 & 1 Vict. c. 80 extended the exemption to bills and notes not having more than twelve months to run. That enactment was continued by the 2 & 3 Vict. c. 37, s. 1, which excepted from its operation loans on the security of land. The 17 & 18 Vict. c. 90, which passed in the year 1854, entirely repealed the usury law. This plea is bad for not alleging that the original bills were given while the usury law was in force: *Thibault v. Gibson*, 12 M. & W. 88.† But even assuming that they were, the bills declared on were given after the usury law was repealed, and therefore they are not affected by the previous illegal contract. [MARTIN, B.—The 12 Anne, stat. 2, c. 16, rendered an usurious contract utterly void; then what consideration is there for the new bills?] By the 2d section of the 17 & 18 Vict. c. 89, it is provided “that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this Act.” Therefore, as the original bills were void at the time they were given they could not

now be enforced, but the receipt of money which *the defendant was under a moral obligation to repay is a sufficient consideration to support a new contract after the usury law was repealed. *Barnes v. Hedley*, 2 Taunt. 184, decided that after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding. *Wicks v. Gogerley*, Ry. & M. 123 (E. C. L. R. vol. 21), is an authority to the same effect. So in *Wright v. Wheeler*, 1 Camp. 165, note, where an obligee cancelled a bond by which usurious interest was payable, and the obligor gave him another bond for principal and legal interest only, Lawrence, J., ruled that it was valid. [MARTIN, B.—It appears by the report in Camp. 157, that *Barnes v. Hedley* was first tried before Chambre, J., and he ruled that, if money is lent at usurious interest, a subsequent contract to repay the principal with legal interest was void under the 12 Anne, stat. 2, c. 16.] Though the contract is void, the original debt is a sufficient consideration to support a new promise. [POLLOCK, C. B., referred to *Fitzroy v. Gwillim*, 1 T. R. 153.] *Mather v. Lord Maidstone*, 18 C. B. 273 (E. C. L. R. vol. 86), shows that a person may be liable on a new security although the one for which it was substituted could not be enforced against him.

Macnamara, in support of the plea.—At the time the original bills were given an usurious contract was not only void but also illegal, for the person who received money under it was subject to a penalty of treble the value. The 3 & 4 Wm. 4, c. 98, s. 7, and 7 Wm. 4 & 1 Vict. c. 80, do not affect this question, because they only created an exemption in certain cases from the penalties imposed by the 12 Anne, stat. 2, c. 16; and therefore it is sufficient for *the defendant to show that the contract was usurious within that statute, and if the plaintiff relies on the exemption, that should come by way of replication: *Thibault v. Gibson*, 12 M. & W. 88,† *Washbourn v. Barrows*, 1 Exch. 107,† *Derry v. Toll*, 5 Exch. 741.† It appears that the bills declared on were drawn and accepted in the years 1855 and 1856, and therefore after the usury law was repealed by the 17 & 18 Vict. c. 90; but the plea shows that they were accepted to secure the payment of money lent upon an usurious contract, and secured by bills given while the usury law was in force. Therefore the substituted bills were tainted with the original usurious contract, and that being void, there was no consideration for them. The case falls within the 2d section of the 17 & 18 Vict. c. 90, which preserves all rights and liabilities in respect of transactions previous to that Act. There is no new contract, but merely a renewed security for payment of money under an usurious contract. [WILDE, B.—If, before the usury law was repealed, the parties to an usurious contract destroyed the securities, and made a new contract to pay the principal and legal interest, that contract was valid, then why is not a new contract valid since the usury law has been altogether repealed?] *Barnes v. Hedley*, 2 Taunt. 184, is distinguishable on two grounds: first, the destruction of the usurious securities by mutual consent was a sufficient consideration to support a new promise; and secondly, the promise was to pay the principal and legal interest. Here the bills declared on were given to secure payment of the usurious interest. Where a bill of exchange

tainted with usury was in the hands of an innocent holder, and, on being informed of the usury, he took a fresh bill in lieu of it, drawn *708] by one of the parties to the *usurious contract, and accepted by a third person for his accommodation, it was held that the holder could not maintain an action against the acceptor of the substituted bill: *Chapman v. Black*, 2 B. & Ald. 588. [POLLOCK, C. B.—If the innocent holder of a promissory note made for an usurious consideration took from the maker of it a bond for payment of the amount, the bond was valid: *Cuthbert v. Haley*, 8 T. R. 390. CHANNELL, B.—The 58 Geo. 3, c. 93, enacts that no bill of exchange or promissory note given upon an usurious contract shall be void in the hands of an endorsee for valuable consideration without notice.] *Cuthbert v. Haley* does not support the proposition contended for. There the Court expressed an opinion that a substituted security given for a security tainted with usury is void if given to a party to the original contract. *Wicks v. Gogerley*, R. & Moo. 123 (E. C. L. R. vol. 21), is an authority in favour of the defendant, for it decided that a new promise to pay the principal originally lent on an usurious agreement is invalid, unless all payments beyond legal interest are repaid or deducted. Here the substituted security is for the principal and usurious interest. The receipt of the money under the usurious contract is no consideration for a new promise to pay it. There is a distinction between cases where there is a moral consideration for payment of a debt not enforceable at law, as where an infant after attaining his majority promises to pay a debt contracted during infancy, and where a statute has expressly declared that a particular contract shall be illegal and void. In the former case the duty constitutes a sufficient consideration for a promise to pay the debt, but in the latter, the contract being declared void and an offence at law, there can be no consideration for any new promise. *Cur. adv. rull.*

*709] *The learned Judges having differed in opinion, in the ensuing Term (May 8) the following judgments were delivered.

MARTIN, B.—This is a demurrer to a plea. The action is upon several bills of exchange. The plea is, that before the making of the bills declared on it was corruptly and against the form of the statutes agreed between the plaintiff and the defendant and one Robinson that the plaintiff should lend them 1500*l.*, and that he should forbear and give day of payment to them until a future day, and that for such forbearance they should pay to him more than lawful interest at the rate of 5*l.* per cent. per annum upon the sum so lent and forborne, and that for securing the repayment of the said sum of 1500*l.* and interest, the defendant and Robinson should accept and deliver to the plaintiff certain bills of exchange drawn by the plaintiff upon them, whereby they engaged to pay to the plaintiff, or his order, 1600*l.* ten weeks after the date thereof and of the loan. That in pursuance of the said unlawful agreement the plaintiff made the loan, and the defendant and Robinson accepted the bills, and that save as above there was no consideration for these acceptances. That these bills of exchange were dishonoured at maturity, and that the bills of exchange declared on were given, after the passing of the statute 17 & 18 Vict. c. 90, by way of renewal of the said first-mentioned bills, and accepted to secure the payment to the plaintiff of the money secured by the

first-named bills so given to the plaintiff and the said usurious interest, and that save as aforesaid there was not any value or consideration for the acceptance by the defendant of the bills sued on.

The plea disclosed this state of things, viz., that when the loan was made and the first bills of exchange given the statute 12 Anne, stat. 2, c. 16, was in operation, but *that when the bills of exchange declared on were given the statute 17 & 18 Vict. c. 90 [*710 had passed. The latter statute repeals the statute of Anne, but the second section provides that nothing in it shall prejudice or affect the rights or remedies, or diminish or alter the liabilities of any person in respect of any act done previous to its passing. The original loan and bills of exchange were therefore left unaffected by it. The statute of Anne enacts that no person upon any contract shall take for a loan of money above 5*l.* per cent. for a year, and that all contracts for payment of any principal so lent *shall be utterly void*, and that any person who shall take above 5*l.* per cent. for a year shall forfeit and lose for such offence *treble the value of the money lent*. The loan was therefore an illegal transaction, and the original contract to repay it, and the bills of exchange given for it, were utterly void; and the plea states that save these there was no other consideration for the bills declared on.

It is quite clear that a bill of exchange is a simple contract; it and promissory notes differ from other simple contracts in this, that *prima facie* they import consideration; but when it is proved that there was no consideration, or an illegal one, the bill of exchange or note is of no avail. It does seem superfluous to cite any authority for the above positions, but in my brother Byles's book upon Bills, page 111 (8th edition), it is stated that the defendant is at liberty in all cases (when the issue raised admits of it) to show affirmatively, by his own witnesses, absence or failure of consideration; and again, page 124, the consideration given for a bill must not be illegal; and at page 132, if part of the consideration of a bill be illegal, the instrument is vitiated altogether; and at page 288, usury is said to be an indictable misdemeanor at common law, for which Comyns's Digest, title *Usury*, is cited. Now the consideration for the bills declared on was the usurious loan, and the bills of exchange given to secure it. But the statute of *Anne has declared these to be utterly void; and, [*711 speaking for myself, I cannot understand how an utterly void and illegal contract or transaction can be a legal consideration for a new contract. But the case does not rest here, for at page 294 the same learned author states that if an usurious bill be in the hands of a holder who was a party to the usurious transaction, and he gives it up for a substituted security, the original usurious taint infects the subsequent security, and either is void. Now applying the above statement of the law, the consequence seems to me inevitable that the bills of exchange sued on are not of avail in the hands of the plaintiff, who was the usurious lender, and that the plea is good.

But a case of *Barnes v. Hedley*, 2 Taunt. 184, was cited. According to the statement in the report, a person called Webb had agreed to lend money at 5*l.* per cent. interest, but with a proviso that he should also receive a commission of 5*l.* per cent. upon sugars to be bought of him or provided by him, and certain deeds and securities

were given to him to secure the balance due. It was admitted at the trial that this was an usurious contract, but it was proved that in consequence of its being intimated to Webb that it was so, it was agreed that Webb should make out fresh accounts, leave out all the usurious charges, charge only for the principal money and legal interest, and that the original deeds and securities in the possession of Webb should be given up and cancelled. Webb accordingly made out such fresh accounts, in which he omitted the usurious charges, and the balance sought to be recovered in the action was composed of the principal moneys actually advanced, with lawful interest fairly and legally calculated, the whole commission and every objectionable charge being omitted. The account was delivered to the debtor, who *712] acknowledged the balance, and promised to pay it, and *there- upon the deeds and securities originally given to Webb were produced, and cancelled and burnt in the presence of the debtor. The Court of Common Pleas held that the balance so arrived at and promised to be paid was recoverable at law, and so certified to the Lord Chancellor, the case being an issue from Chancery. I cannot myself see the application of this case to the present. If it had appeared upon the record that the plaintiff and defendant had accounted together and struck off the usurious interest, and the latter had given the bills declared on for the amount of the original loan and legal interest, it would have been an authority in favour of the plaintiff, but nothing of the kind appears upon the plea; indeed the contrary appears, for the bills declared on are stated to have been given to secure the payment to the plaintiff of the money secured by the bills of exchange given to him in furtherance of the illegal and corrupt contract, and that there was no other consideration for them. The case has been put thus, that when the bills declared on were given there was no usury law, and it was competent for the defendant to pay or contract to pay interest to any extent, and that the bills were lawful, assuming them to have been given for a loan then made. This is quite true, but it has no application to the real and true case under consideration. There was no loan after the repealing statute was passed. There was no correction of the original unlawful transaction. There is nothing whatever shown on the record except bills given upon and in respect of a transaction which the law had declared to be utterly void, and which at one time seems to have been considered an indictable crime.

Another case was cited, *Wright v. Wheeler*, which will be found in a note to *Barnes v. Hedley*, 1 Camp. 165. This was an action upon a *713] bond. There had been an usurious *contract, but afterwards the parties agreed that some usurious interest which had been paid should be deducted from the principal, and a bond given for the balance of the principal, with lawful interest. Mr. J. Lawrence was of opinion at nisi prius that the bond was lawful. The parties, he said, had rectified their error, and substituted for an illegal contract one which was fair and legal. The case has no bearing upon the present. There is here no substitution of a legal contract for an illegal one; it is a mere continuance of the old unlawful contract. *Cuthbert v. Haley*, 8 T. R. 390, is to the same effect.

A case of *Wicks v. Gogerley, R. & Moo.* 123 (E. C. L. R. vol. 21), was

also cited by the leading counsel for the plaintiff, but according to the statement of the law laid down there by C. J. Best, the plaintiff is not entitled to recover. He says the principle is, that where parties to an usurious agreement "state an account and agree upon the sum which would be due for principal and legal interest, after deducting all that has been paid beyond legal interest, and a fresh promise is made to pay that sum, such promise is free from the original usury, and is perfectly valid in law. But, in order to bring this case within the principle, all beyond legal interest must be repaid or deducted." In the report of *Barnes v. Hedley* in 1st Campbell, which I have before referred to, there is a judgment of Mr. J. Chambre, which seems to me to be well worthy of consideration by any one who desires to ascertain what is the true law upon this subject. There is also a case which was not mentioned in the argument, *Preston v. Jackes*, 2 Stark. 237 (E.C. L. R. vol. 3), which was tried before Mr. J. Holroyd, who held that a party could not recover on a note which operated as a security for any usurious interest. This case seems to me in point for the defendant, and any *opinion of Mr. J. Holroyd, whenever given, is entitled to the greatest weight and is of the [714 highest authority.

The result is, that in my opinion an usurious loan within the statute of Anne, and usurious interest contracted to be paid for it, is not a good consideration for a bill of exchange, and that a bill given upon such consideration is not of avail; and this opinion does not contravene the case of *Barnes v. Hedley*, reported in 2 Taunton, or any other case or authority which I have met with or has been referred to; but on the contrary, in my opinion, is in conformity with them all.

POLLOCK, C. B.—The judgment which I am about to deliver is that of my brother Wilde and myself.

My brother Martin having stated the pleadings, it is not necessary to repeat them.

The real question raised by this demurrer is, whether there is a good consideration for the bills declared upon.

The original bills were given for an advance of money with *usurious interest* at a time when such a transaction was forbidden by law, and were therefore *void* and of *no legal obligation*.

The bills sued on were given since the repeal of the usury law, and at a time when the giving or confirming an obligation to *pay any amount of interest* however high was perfectly legal and binding.

But the altered law did not render valid the original bills; they were void when given, and remained void and of no legal obligation up to the time when they were renewed by the bills in question.

The original bills, therefore, could not form a legal consideration for those now sued upon. Indeed, there was, when the fresh bills were given, no legal obligation whatever upon the defendant to repay a single farthing of the large advance he had received. But for that advance he has *voluntarily given these bills, and whether [715 the law will permit and enforce such a contract is the question.

During the existence of the usury law the Courts of law were bound to enforce them—to deal with interest above the statute rate as an

unlawful and forbidden thing—and to discover and defeat all attempts, direct or indirect, to give or enforce it.

But the legislature has since repealed the laws against usury, and upon a fuller and wider view of public policy declared the rate of interest on loans to be unlimited and free.

The Courts of law are bound with equal fidelity to give effect to this new and opposite view of the legislature. Interest above 5l. per cent. should no longer be regarded as of necessity illegal or unrighteous, and no facility should be given to escape from an obligation to repay a real advance of money, or evade a contract willingly made, though interest should have been contracted for, which used to be at a rate called usurious rate.

We make these remarks, because in argument the expression "taint of an usurious transaction" was often repeated, and the Court was pressed in language, commonly and properly used while the usury laws were in force, to give no countenance to a contract of which the origin was an advance of money with more than 5l. per cent. interest.

Such remarks have no application to or bearing on a contract made like that in question since the usury laws have been repealed.

We therefore pass them by to consider the true question in the case, viz., whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so.

Such a consideration has been sometimes called a moral consideration. And we think unfortunately so; for the term *used as
*716] a definition tends to include too wide a range of objects.

And there are many conjunctures in which a man may feel himself morally bound to pay money and promise to do so, which the law would not recognise as forming a good consideration.

But a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid.

And though at the time of the advance the law, for reasons of public policy, forbid any liability, and incapacitate the parties from making a binding contract, there is no reason why a binding contract should not be made afterwards if the legal prohibition be removed.

And the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise to be made originally, does not cease to be sufficient when the legal restriction is abrogated.

There is, therefore, reasonable ground, as it seems to us, for this qualified proposition, viz.—That a man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt within

There is likewise authority for it. The general doctrine, within which such a proposition falls is, we believe, first found promulgated in Lord Mansfield's time. It is the subject of a long note to the report of the case of *Wennall v. Adney*, 3 Bbs. & P. 249. It has been the subject of much discussion in many subsequent cases. It was stated most widely, and perhaps too widely, in the case of *Lee v. Muggeridge*, 5 Taunt. 45 (E. C. L. R. vol. 1). And it has conse-

quently been much qualified and *sometimes disparaged since: see *Eastwood v. Kenyon*, 11 A. & E. 447 (E. C. L. R. vol. 39); [*717 *Beaumont v. Reeve*, 8 Q. B. 487 (E. C. L. R. vol. 55); *Cocking v. Ward*, 1 C. B. 870 (E. C. L. R. vol. 50).

But it was repeated and stated to be undoubted law by Baron Parke, in *Earle v. Oliver*, 2 Exch. 71, 89,† who says, “the strict rule of the common law was no doubt departed from by Lord Mansfield in *Hawkes v. Saunders*, Cowp. 290, and *Atkins v. Hill*, Cowp. 284.

“The principle of the rule laid down by Lord Mansfield, is, that where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it.

“There is a very able note to the case of *Wennall v. Adney*, 3 Bos. & P. 247, explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the Statute of Limitations, and the rule in these instances has been so constantly followed, that there can be no doubt that it is to be considered as the established law.”

The case of *Fitzroy v. Gwillim*, 1 T. R. 153, is an example of the view that has been taken of the subject even in a Court of law, but although that case is certainly not law, it is quite true that Courts of equity have relieved (where their interference was wanting) only on the terms of the principal and legal interest being paid.

We think the view we have taken receives considerable support from the case of *Barnes v. Hedley*, 2 Taunt. 184, which, if not a direct authority for the plaintiff, is somewhat similar in its *circumstances; the usurious interest was in that case struck out, but [*718 now, since the repeal of the statute of Anne, there is nothing unlawful in usurious interest. Here the defendant says, “I could not then make the promise: I can now, and I am willing to do so.”

The plaintiff is therefore, in our opinion, entitled to the judgment of the Court. Judgment for the plaintiff.

It still remains, after a century's discussion, unsettled, what kinds of moral obligation are adequate to sustain an express promise. The earliest discrimination was manifested in limiting the efficacy to such as had been of antecedent legal obligation. The celebrated note to *Wennall v. Adney*, 8 Bos. & Pul. 252, is the great authority for this position, and is constantly appealed to: 1 *Parsons on Contracts* (5th ed. 1864) 432, n. (s); whilst, nevertheless, the case of *Lee v. Muggeridge*, 5 Taun. 36, which repudiated this restriction, has been by no means abandoned.

That great common lawyer, Baron Parke (now Lord Wensleydale), has given a definition, quoted with approbation in the principal case, which seeks to moderate the view of either extreme and to unite both upon a middle ground. He thus states his mature conclusion: “The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by

some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it:" *Earle v. Oliver*, 2 Exch. 71.† *Goulding v. Davidson*, 12 Smith (N. Y. Court of Appeals, 1863) 604, is a very important case, which stands squarely upon this consolidated basis. There a married woman bought goods on her own credit in order to carry on her trade, and gave her individual notes in payment of the debt thus contracted. Upon the death of her husband she promised to pay the notes and the residue of the price of the goods. The court, after an elaborate review of the English and New York authorities, unanimously decided that the consideration was sufficient and the promise binding. *Hemphill v. McClimans*, 12 Harris (Pa. 1855) 367, is another leading case. The point for adjudication was precisely that presented in *Lee v. Muggeridge*, and that famous precedent was, after full consideration, followed. In the former case a married woman induced the plaintiff to erect for her son a saw-mill, by promising to pay for the work. She acknowledged her liability during coverture, and after her divorce promised to pay the debt. The court deemed the consideration, i. e. the prejudice to the plaintiff, adequate to uphold the promise. In *Paul v. Stackhouse*, 2 Wright (Pa. 1861) 302, Judge Woodward, whilst acknowledging that a majority of the court concurred in holding the consideration sufficient, expresses his dissent from that position, and suggests that the decision should have been put upon the ground that a previous request converted the past into a present consideration. Inasmuch, however, as the case before the court did not call for a decision of that point; which could arise only

when there was no previous request, his Honor's emendation is extra-judicial, and the authority of *Cunningham v. Given*, 10 Barr (Pa. 1849) 366, which is directly in point, forbids its adoption. In that case the assignee for the benefit of creditors continued the agreement of his assignor with a contractor to complete the contract. An order by several of the creditors on the assignee in favour of the contractor was held irrevocable, for the reason that it was founded on a sufficient consideration. The benefit which was conferred upon the creditors, though a past consideration and unprompted by any previous request, was held sufficient to uphold their agreement to compensate.

In such states as have Married Women's Acts the doctrine of *Littlefield v. Shee*, 2 Barn. & Ald. (1831) 811, does not apply. Property acquired by a *feme covert* is not presumed to belong to her baron, but to herself. Accordingly, goods supplied her would constitute a benefit to her individually, which would ground a promise, made when she became *discovert*, to pay for them: *Goulding v. Davidson*, *supra*; 16 Phila. Legal Int. (District Court, Hare, J.) 308.

Under Lord Wensleydale's definition, the question of usury, when complicated with the consideration, does not present so much difficulty. It ceases to be an objection that there never existed a *legal* obligation.

The view, which underlies Chief Baron Pollock's opinion in the principal case, that usury laws are the unjust tamperings of legislators with private contracts, is, undoubtedly, sound political economy. Yet it would be a stretch of judicial authority to hold that their repeal reacts, in spite of its express language, so as to convert usurious interest, which accrued while usury laws were in full force, into lawful interest. The decisive answer to the

charge of usurpation, however, is to be found in the principle enunciated in *Foster v. Dawber*, 6 Exch. (1851) is remarkable that no reference was made to the principle which would decide that the civil law doctrine of novation applies to commercial paper. Hence, any consideration was sufficient to support the notes, and there was no necessity for relying on the doctrine of novation.

BEST v. HAYES.—JANE GALLAGHER, Claimant. Jan. 23.

A Court of law is not bound by the principles which govern Courts of equity upon a bill of interpleader, and may give relief although one of the parties has incurred to another a personal obligation independently of the question of property, and the claims are not identical.

The defendant, an auctioneer, sold for the plaintiff some furniture and paid him a part of the proceeds; but whilst the balance was in his hands G. gave him notice that the furniture belonged to her. The plaintiff having brought an action against the defendant for the balance, he sought to deduct his charges for commission, &c., and applied for an interpleader order between the plaintiff and G. as to the residue; G. being willing to allow the defendant his charges.—Held, that a Judge had power to make the interpleader order, if not under the 1 & 2 Wm. 4, c. 58, under the 12th section of the Common Law Procedure Act, 1860.

THIS was a rule calling on the defendant and the claimant, Jane Gallagher, to show cause why an interpleader order, made by Wilde, B., on the 15th of May, 1862, should not be rescinded.

The affidavit of the defendant, in support of the interpleader order, stated, that the action was brought for money had and received, to recover the proceeds of certain furniture and effects, which, in March, 1862, had been intrusted by the plaintiff to the defendant, an auctioneer, to sell by auction. The furniture and effects were sold by the defendant on the 3d, 4th, and 7th of April, and produced the sum of 610*l.* 7*s.* 5*d.* The expenses attendant upon such sale for printer's bills, advertisements, &c., with the amount of the defendant's commission, were 48*l.* 13*s.* 3*d.* The defendant had paid 2*l.* 19*s.* 6*d.* to a person for taking care of the furniture and effects, by direction of the plaintiff, and 25*l.* for rent levied by the landlord of the premises on which the furniture and effects were sold, which, together with 11*s.*, the cost of the distress, amounted to 77*s.* 3*s.* 9*d.*, leaving a balance of 533*l.* 3*s.* 8*d.* On the 5th of April, the defendant paid the plaintiff 300*l.* on account, leaving a balance in his hands of 233*l.* 3*s.* 8*d.*; and he afterwards received a notice, on behalf of Jane Gallagher, that she claimed the proceeds of the furniture and effects. The action was commenced on the 23d of April, and the declaration was delivered on the 28th. The affidavit also stated that the defendant did not claim any interest whatsoever in the sum of 233*l.* 3*s.* 8*d.*

The claimant, Jane Gallagher, made an affidavit in which she stated that the furniture was purchased by the plaintiff for her and on her sole account, but in his own name, under an order of the Court of Chancery of the county palatine of Lancashire, in which Johnson and others were plaintiffs and the deponent defendant. There was also an affidavit by the attorney of Gallagher, in which he stated that she was willing that the plaintiff should pay the balance into the Court

of Chancery of the county palatine to the credit of the suit; and that the defendant should be relieved from any further liability, and be allowed to retain all his proper fees, costs, and charges.

The interpleader order (so far as material) was as follows:—"Upon hearing counsel, &c., I do order that as to the sum of 248*l.* 3*s.* 8*d.*,^(a) in which the defendant claims no interest, the parties do proceed to the trial of an issue, in the Court of Exchequer, in which the said plaintiff shall be plaintiff and the said Jane Gallagher, the claimant, shall be the defendant; and that the question to be tried shall be, whether the proceeds of the sale of the goods alleged to belong to the *720] plaintiff, and claimed by the said Jane *Gallagher, are the property of the said Jane Gallagher as against the said plaintiff. . . . The said sum of 248*l.* 3*s.* 8*d.* to be paid forthwith into Court, to abide the further order of this Court. And I further order that the said Jane Gallagher and the plaintiff shall be barred from prosecuting their claim against the defendant for or in respect of the said sum of 248*l.* 3*s.* 8*d.*

"I reserve the question of costs until after the trial of the issue; and as to the remainder of the money claimed to be in the defendant's hands, the plaintiff shall be at liberty to continue this action, if he think fit, at his peril; the defendant only to set up his own claim for detention of such sum."

Morgan Lloyd, in last Trinity Term, obtained a rule nisi to rescind the above order. The affidavit of the plaintiff, in support of the application, stated that the furniture had been purchased by him under an agreement with the claimant, Jane Gallagher, that she was to pay for it by weekly instalment, and that she had made default in payment.

Wills now showed cause.—Whatever objection might formerly have been made to this interpleader order, on the ground that the plaintiff merely seeks to enforce against the defendant the performance of his contract, is now removed by the 12th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which enables the Court to grant relief "though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another." Where a defendant contracted with the plaintiff for the completion of certain work, which he finished, and after part of the price had been paid to him a third person claimed the residue, alleging that the plaintiff was merely his agent in making *721] the contract, Blackburn, J., considered that relief might *probably have been granted under the 1 & 2 Wm. 4, c. 58, but he decided the case on the broad ground that the 12th section of the Common Law Procedure Act, 1860, enabled the Court to give relief whenever it appeared that in the particular case the relief would be complete and just: *Maynell v. Angell*, 32 L. J., Q. B. 14. The case of *Baker v. The Bank of Australasia*, 1 C. B. N. S. 515, is distinguishable, because there no issue could have been framed which would have determined the question in dispute between the parties

(a) On the hearing of the interpleader summons, the plaintiff having objected to the amount of commission claimed by the defendant, he consented to give up 15*l.*, and the order was accordingly drawn up as to 248*l.* 3*s.* 8*d.* instead of 233*l.* 3*s.* 8*d.*

who were called upon to interplead. Here complete justice may be done, for the claimant is willing to allow the defendant his charges against the plaintiff and to accept an issue as the residue of the proceeds of the goods. [MARTIN, B.—It would seem from the case of *Thorne v. Tilbury*, 3 H. & N. 534,† that the defendant is not estopped from setting up the claimant's title.]

The Court then called on

Morgan Lloyd, to support the rule.—The defendant has contracted with the plaintiff to pay over this money to him, and the plaintiff seeks to enforce the performance of that contract. The Interpleader Act, 1 & 2 Wm. 4, c. 58, s. 1, was intended as a substitute for the old mode of obtaining relief by bill in equity, and Courts of law are guided by the principles which govern Courts of equity: *Slaney v. Sidney*, 14 M. & W. 800;† *Lindsey v. Barron*, 6 C. B. 291, 294 (E. C. L. R. vol. 60). A party cannot obtain relief by interpleader where he has incurred a personal liability to either of the contending parties: *Patroni v. Campbell*, 12 M. & W. 277.† There *Rolfe, B.*, referred to *Crawshay v. Thornton*, 2 Myl. & C. 1, where Lord Cottenham, C., laid down that if a plaintiff in an interpleader suit has incurred to one of the defendants a personal obligation, independently of the *question [722 between the defendants themselves, he cannot compel them to interplead. Again, there can be no interpleader in equity unless the litigant parties claim the same debt or duty: *Glyn v. Duesbury*, 11 Sim. 139. Here the claims are not identical, because they are of different amounts. [CHANNELL, B.—Might not the claimants have separate rights to parts of the money? In *Glyn v. Duesbury* the two debts were originally and substantially different in their nature.] In *Diplock v. Hammond*, 2 Sm. & G. 141, it was held a fatal objection that the plaintiff in the interpleader suit called upon the defendants to interplead as to a less sum than they claimed against him. [MARTIN, B.—It was, no doubt, stated by Parke, B., that, in cases of interpleader, Courts of law would follow the rules of Courts of equity, but the Interpleader Act does not require it.] *Mitchell v. Hayne*, 2 Sim. & S. 63, decided that where an action is brought against an auctioneer for a deposit, he cannot sustain a bill of interpleader, if he insists upon retaining either his commission or the duty. [MARTIN, B.—The defendant does not claim any interest in the corpus of the money. His claim to deduct the expenses of the sale is not an interest within the meaning of the Interpleader Act. The only interest he claims is by reason of his contract with the plaintiff.] He has no right as against Gallagher, the claimant, to deduct the expenses of the sale. [MARTIN, B.—That might be an objection on her part, but she assents to the deduction.] Moreover the claim of Gallagher is merely of an equitable nature, and therefore not the subject of interpleader: *Roach v. Wright*, 8 M. & W. 155.† At all events, as the solvency of Gallagher is doubtful, the Court will not call upon the plaintiff to interplead with her without requiring her to give him security for his costs: *Deller v. Prickett*, 15 Q. B. 1081 (E. C. L. R. vol. 69).

*POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. This order is in conformity with the practice [723 which has prevailed in this Court (and I believe in every other Court in Westminster Hall) ever since they have had jurisdiction to make

interpleader orders. No doubt, Judges have occasionally looked at what was the practice of Courts of equity upon a bill of interpleader; but in my opinion it would be injurious to the public if we were to adopt that as a rule, for the consequence would be that, whenever a plaintiff brought an action in respect of a claim which might be the subject of interpleader in a Court of common law, if there was combined with it some matter which did not admit of a bill of interpleader, the party against whom the action was brought would be deprived of the benefit of an interpleader order. It is a common occurrence for a defendant to come before a Judge at Chambers and say:—"I am sued by A. and B. With respect to B., I have no defence, and what he claims I am ready to give up to him. As to the claim of A., I am sued by another person in respect of it, and I ask for the protection of the Court by an interpleader order." Under such circumstances what is there unreasonable in making an order? On the contrary it seems to me that it would be unjust to adopt a different course and refuse relief.

MARTIN, B.—I am of the same opinion. The authority of the Court or a Judge in matters of this kind depends on two Acts of Parliament, the Interpleader Act (1 & 2 Wm. 4, c. 58), and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). I am aware that in many cases stress has been laid, and by no means improperly, on the proceedings of Courts of equity upon a bill of interpleader; but the *724] authority given by the Interpleader Acts to Courts *of common law is to make an order as to the trial of an issue and "such other rules and orders as to costs and all other matters as may appear to be just and reasonable." There is no reference in any part of the Act to the practice of Courts of equity. Therefore what the Legislature has prescribed and the Court or a Judge must do, is that which is just and reasonable between the parties. There were some matters with respect to interpleader, as to which, with a more enlarged and enlightened construction of the Act, more ample justice might have been done; but now a remedy is provided by the 12th section of the Common Law Procedure Act, 1860. I can state that the order of my brother Wilde is in accordance with the practice for the last twelve years. It seems to me that it is a beneficial practice, and a great saving of expense to the parties, and I am at a loss to know why we should alter it.

CHANNELL, B.—I agree that the order of my brother Wilde was right; and I think it would be so independently of the authority given by the 12th section of the Common Law Procedure Act, 1860. Under the 1 & 2 Wm. 4, c. 58, there were some decisions which appear to conflict. I think the true view is that given in *Meynell v. Angel*, 32 L. J., Q. B. 14, but, however that may be, since the authority under 1 & 2 Wm. 4, c. 58, has been extended by the 12th section of the Common Law Procedure Act, 1860, I entertain no doubt that the order was correctly made, upon the facts presented to the Judge, and that there is no ground for this application.

WILDE, B.—The argument for the plaintiff has failed to convince me that the order is wrong; and it certainly is in accordance with the *725] usual practice at Chambers. It now *appears that the reason why the order was questioned was, that some doubt existed as

to the solvency of the other party who was made a defendant in the interpleader issue. That may afford ground for an application at Chambers for security, but it is no reason for questioning an order which is in conformity with the usual practice.

Reliance has been placed upon the proceedings of Courts of equity in giving relief upon bill of interpleader. No doubt, when Courts of law were first empowered to grant a summary remedy by interpleader order, they naturally turned to Courts of equity to ascertain the general principles upon which those Courts acted in the case of interpleader; and Mr. *Lloyd* is right in saying that those principles have been the guides of Courts of law. But the reference to Courts of equity was a reference for principles, not for practice, or minute and technical rules for working out the justice of a case. The powers of a Court of law are only restricted by the Acts of Parliament which have conferred them: and it is now too late to contend that they have no power to do that which they have, for so long a period, been in the habit of doing. I therefore think that the rule ought to be discharged with costs.

Rule discharged with costs.

*DEWHURST v. KERSHAW. Jan. 30. [*726

A deed of assignment by a debtor of his estate and effects for the benefit of such creditors as shall execute it within a certain specified time, is not valid within the 192d section of the Bankruptcy Act, 1861, and the certificate of registration of such a deed is no protection to the debtor under the 198th section.

THIS was an action against the defendant under "The Summary Procedure on Bills of Exchange Act, 1855." The action was commenced on the 10th of October, 1862, and on the 14th the defendant assigned all his estate and effects for the benefit of his creditors.

The indenture was between "John Kershaw (the defendant) of the first part, Elizabeth Ramsay and David Roberts, trustees for themselves and the rest of the creditors of the said John Kershaw, parties thereto, of the second part, and the several other persons whose names and seals are hereunto subscribed and set, being respectively creditors of the said John Kershaw, of the third part": After reciting that "the said John Kershaw is justly indebted unto the said parties hereto of the second and third parts in the several sums set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full, he has therefore proposed and hath agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors as hereinafter mentioned:" It was witnessed, that in pursuance of the said agreement and in consideration of the premises and of 5s., &c., "the said J. Kershaw doth by these presents bargain, sell, assign, transfer, and set over unto the said trustees, their executors, &c., all and singular the household furniture, &c., books of account, debts, sum and sums of money, and all securities for money, &c., and all other the personal estate and effects whatsoever and wheresoever of him the said J. Kershaw in possession, reversion, remainder, or expectancy." Habendum: "the said stock in trade and all other the estate, effects, and premises hereby assigned, or intended so to be, unto the said

*727] trustees, their executors, *&c., absolutely, upon trust nevertheless to collect and receive, or sell and dispose of the said hereby assigned premises, and every part thereof, either by public sale or private contract, &c.: And upon trust out of the moneys to be received by virtue of these presents, to pay all costs and expenses of proposing, preparing, engrossing, and executing these presents, and attending or relating to the said hereby assigned premises or the trusts hereby created; and in the next place to pay, retain, and satisfy, rateably and proportionably and without any preference or priority to themselves, the said trustees and their partners, and the other persons parties hereto of the third part, who shall execute these presents within twenty-one days from the date hereof, the several debts or sums set opposite to their respective names in the said schedule hereto, and to pay the residue, if any, of the said moneys unto the said J. Kershaw, his executors, &c.: Provided, nevertheless, that such creditors of the said J. Kershaw as shall not execute, or assent in writing to take the benefit of these presents on or before the 14th day of January next, or within such further time, not exceeding thirty days, as the said trustees shall by writing under their respective hands and seals declare, shall be excluded from all benefit under these presents."

The indenture was executed by a majority of three-fourths in value of the creditors whose debts amounted to 10*l.* and upwards, and was duly filed and registered in the Court of Bankruptcy, under the 193d and 194th sections of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and a certificate of the filing and registration was delivered to the defendant.

On the 20th of January the defendant was arrested by the sheriff of Monmouthshire under a writ of *ca. sa.* issued on a judgment signed in this action on the 27th of October.

*728] *Gray* now moved to discharge the defendant out of *custody.—The question is, whether the deed is valid under the 192d section of "The Bankruptcy Act, 1861." It is objected that it is invalid because it provides that such creditors as shall not execute it before the time named shall be excluded from all benefit under it. [WILDE, B.—The 198th section says, that a certificate of the filing and registration of the deed "shall be available to the debtor for all purposes as a protection in bankruptcy." CHANNELL, B.—The words are "*such* deed," that is, a deed valid under the 192d section.] In *Harris v. Petit*, 31 L. J. Chan. 552, a similar objection was raised to a deed of assignment under the 68th section of the Bankrupt Law Consolidation Act, 1849, and *Stuart, V. C.*, held that the argument, that the assignment was not for the benefit of all the creditors because some of them might not choose to avail themselves of it, was not maintainable. [MARTIN, B.—In *Ex parte Godden*, 32 L. J. Bank. 37, the Lords Justices decided that a deed of assignment of a debtor's estate was not valid under the 192d section of the Bankruptcy Act, 1861, unless it was for the benefit of *all* the creditors.] Before that Act passed, under an ordinary bankruptcy all the creditors did not necessarily participate, for they were not entitled to any dividend unless they chose to prove their debts. If a creditor refuses to execute a deed of assignment, he ought to be in the same position as a creditor who refused to prove his debt.

Per CURIAM.(a)—The case of *Ex parte Godden* is conclusive against this deed, and there ought to be no rule.

Thrupp appeared to show cause in the first instance.

Rule refused.(b)

(a) Pollock, C. B., Martin, B., Channell, B., and Wilde, B.

(b) See *Ex parte Morgan*, 32 L. J. Bank. 15.

**MOUNSEY v. ISMAY.* Jan. 20.

[*729

A custom for the freemen and citizens of a town, on a particular day in the year, to enter upon a close, for the purpose of holding horse-racing thereon, is a good custom, and, in pleading it, it is not necessary to aver that the particular day was a seasonable time.

DECLARATION.—That the defendant broke and entered a certain close of the plaintiff, abutting, &c., and broke down, prostrated, and destroyed the fences of the plaintiff of and belonging to the said close of the plaintiff, and divers posts and rails then standing and being in and upon the said close of the plaintiff, and affixed thereto, and also prostrated, levelled, and destroyed a bank then erected and being parcel of the said close, and pulled up and destroyed the thorns there and thereon then growing: Whereby the plaintiff has sustained damage, &c.

First plea.—That from time whereof the memory of man runneth not to the contrary, on a certain day in each and every year (to wit, on Ascension Day, commonly called Holy Thursday), horse-races have been and of right ought to have been, and still ought to be, holden on a certain piece of land in the extra-parochial hamlet of Kingsmoor in the said county, being in the neighbourhood of the city of Carlisle; and from time whereof the memory of man runneth not to the contrary, there hath been and still of right ought to have been, and still of right ought to be, an ancient and laudable and reasonable custom, used and approved of in the said hamlet and in the said city of Carlisle, that is to say, that the freemen of the said city of Carlisle, on the day aforesaid in each and every year, have during all the time aforesaid been used and accustomed to enter and of right ought to have entered and still of right ought to enter, into and upon the said piece of land in the said hamlet, for the purpose of holding horse-races thereon. And the defendant says, that the close in which, &c., at the *time [when, &c., was parcel of the said piece of land in the said hamlet; wherefore the defendant, being one of the freemen of the said city of Carlisle, broke and entered the said piece of land and the said close in the declaration mentioned, on Ascension Day 1862, for the purpose of holding the said horse-races; and because the plaintiff a short time before the time when, &c., had wrongfully placed and erected fences, posts and rails, and a bank and thorns upon and over the said land and the part of the said land where the said horse-races were accustomed to be held as aforesaid, and continued to keep the same placed and erected until the time, when, &c., insomuch that the said freemen were prevented from holding and were unable to hold the said horse-races as they were accustomed and of right entitled to do, wherefore the defendant being one of the freemen of the said city of Carlisle,

for the purpose of enabling the said horse-races to be held as aforesaid, did on the said day remove the said fences, posts and rails, and the said bank and thorns, doing no more damage thereto than was necessary for the purposes aforesaid, which are the trespasses alleged in the declaration.

Second plea.—The defendant repeats all the allegations in the first plea, except so much of the said plea as alleges that the said custom therein mentioned was a custom for the freemen of the city of Carlisle. And the defendant says, that the said custom was a custom for all the citizens of Carlisle instead of the freemen of Carlisle, and that the defendant, being one of the said citizens, committed the acts in the declaration and first plea mentioned.

Third plea.—That from time whereof the memory of man runneth not to the contrary, on a certain day in each and every year (to wit, on Ascension Day, commonly called Holy Thursday), horse-races have been and of right ought to have been, and still ought to be, holden on certain land *in the extra-parochial hamlet of Kingsmoor in the said county, being in the neighbourhood of the city of Carlisle; and from time whereof the memory of man runneth not to the contrary, there hath been and still of right ought to have been, and still of right ought to be, an ancient and laudable and reasonable custom, used and approved of in the said hamlet and in the said city of Carlisle, that is to say, that the freemen of the said city of Carlisle have been used and accustomed to enter and of right ought to have entered, and still of right ought to enter, into and upon the said land in the said hamlet on the day aforesaid in each and every year during all the time aforesaid, for the purpose of holding horse-races thereon, and to enter into and upon the said land in the said hamlet at a reasonable time before the holding of the said horse-races in each year and every year during all the time aforesaid, for the purpose of preparing and making ready the said land for the more conveniently holding the said horse-races on such day as aforesaid. And the defendant says, that the close in which, &c., at the time when, &c., was parcel of the said land in the said hamlet; wherefore the defendant, being one of the freemen of the said city of Carlisle, broke and entered the said land for the purposes aforesaid, at a reasonable time before the said horse-races held on Ascension Day, 1862: and because the plaintiff a short time before the time when, &c., had wrongfully placed and erected fences, posts and rails, and a bank and thorns upon and over the said land and the part of the said land where the said horse-races were accustomed to be held as aforesaid, and continued to keep the same placed and erected until the time when, &c., insomuch that the said freemen would have been prevented from holding, and would have been unable to hold the said horse-races on the said day as they were accustomed and of right entitled *732] to do, wherefore the *defendant, being one of the freemen of the said city of Carlisle, for the purpose of enabling the said horse-races to be more conveniently held, did then remove the said fences, posts and rails, and the said bank and thorns, doing no more damage thereto than was necessary for the purposes aforesaid, which are the trespasses alleged in the declaration.

Fourth plea.—The defendant repeats all the allegations in the third

plea, except so much of the said plea as alleges that the said custom therein mentioned was a custom for the freemen of the city of Carlisle. And the defendant says, that the said custom was a custom for all the citizens of Carlisle instead of the freemen of Carlisle, and that the defendant, being one of the said citizens, committed the acts in the declaration and third plea mentioned.

Demurrer to pleas, and joinder therein.

Temple (Crompton Hutton with him), in support of the demurrers.—The custom is unreasonable and bad in law. First, it is not claimed for a seasonable time of the year, but for a day uncertain, viz., Ascension Day, which may fall on any day between the 1st of May and the 4th of June, at which time crops must be growing. In *Bell v. Wardell*, Willes 202, a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year, was held bad, because it appeared that the trespasses were committed when the corn was growing. [MARTIN, B.—In *Abbot v. Weekley*, 1 Lev. 176, a custom for all the inhabitants of a town to dance at all times of the year for their recreation in the plaintiff's close was held good.] That case was commented on by Willes, J., in *Bell v. Wardell*, who observed that "it was after a verdict which found the custom," and that "the Court said, that perhaps it might not be good upon a demurrer." Mr. Durnford, however, in a note to *Bell v. Wardell*, observes, "that this part of the opinion of the Court was given, not in answer to the principal objection, [*783 which was that the prescription was bad, but in answer to the second objection that the right or easement should have been claimed by way of custom, not prescription; though indeed it appears extraordinary that the verdict should have removed either of the objections." In a note to *Bell v. Wardell*, a case of *Millechamp v. Johnson* is cited from Willes, C. J., MSS., where a plea of a custom for the inhabitants of a certain town to play at rural sports in the plaintiff's close at all times of the year was held, after verdict, to mean "legal and seasonable times of the year." [MARTIN, B.—It must be assumed that the custom has existed since the time of Richard the First; and why may it not have been reasonable in the then state of the land? CHANNELL, B.—In *Cocksedge v. Fanshaw*, 1 Doug. 118, 132, Lord Mansfield said that "the rule of law is, that whenever there is an immemorial usage, the Court must presume everything possible which could give it a legal origin." WILDE, B.—In *Bell v. Wardell* the declaration was not for treading down the corn on a particular day, but on divers times between the 2d of May and the 12th. The plea alleged a custom to walk and ride over the plaintiff's close "at all seasonable times," and that in walking and riding the plaintiff necessarily trod down the grass and corn there growing, so that it appeared by the plea that the times were not seasonable, although alleged to be so.] Here the plea ought to have averred that the time was a "seasonable time." [CHANNELL, B.—The custom is claimed for a particular day; where it is not for a day certain, it may possibly be necessary to aver that the time was "seasonable."] The Court will judicially notice the time on which Ascension Day falls, and that it is not a "seasonable time." In *Fitch v. Rawling*, 2 H. Black. 393, the custom was for the inhabitants of a parish to play at all lawful games in the plaintiff's [*784

close "at all seasonable times of the year;" and which, as the Court said in *Millechamp v. Johnson*, would not take away all the profits of the land, and might therefore have had a legal origin.—Secondly, the custom is bad because it is claimed for the freemen and citizens of Carlisle, not inhabitants only. Such a custom, to be good, must be confined to residents in the city: *Gateward's Case*, 6 Rep. 59, *Chafin v. Betsworth*, 3 Lev. 190.

Mellish (*Maule* with him) appeared for the plaintiff, but the Court said that they would consider whether it would be necessary to hear him. *Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case, in which Mr. *Temple* argued in support of the demurrer, we intimated to Mr. *Mellish*, who appeared in support of the plea, that probably it would not be necessary to hear him, and we are of that opinion.

It was an action of trespass for breaking and entering a close of the plaintiff, and the pleas in substance alleged a custom for the freemen and citizens of Carlisle on Ascension Day to enter upon a piece of land, of which the plaintiff's close was parcel, for the purpose of horse-racing. The question is whether that custom is good; and we are of opinion that it is, and that the defendant is entitled to judgment.

The custom here alleged is a custom confined to a particular day.

It has been argued that the allegation of such a custom is bad on *735] demurrer, unless it is alleged that the particular *day is a "seasonable day." The case of *Millechamp v. Johnson* (in notes to *Bell v. Wardell*) was cited, in which it was held that a custom alleged to enjoy rural sports, &c., at "all times," must be intended, after verdict, to have been proved to be at all "legal and reasonable" times, thereby implying (it was argued) that the restriction of the words "legal and reasonable" was necessary to make the custom good.

The other two cases cited, *Bell v. Wardell*, Willes 202, and *Fitch v. Rawling*, 2 H. Black. 393, were cases in which the custom was alleged as "all seasonable times," and do not therefore decide anything as to the necessity of such an allegation.

But the case of *Abbot v. Weekley*, 1 Lev. 176, was also cited, in which the allegation of a custom to dance, &c., on the plaintiff's land was alleged "at all times" without any qualification, and this was distinctly held to be good, although not restricted to "seasonable times." There is, therefore, no authority cited for the proposition, that in the case of a custom like the present, if alleged for a certain day, it is necessary to allege further that the day was a "seasonable one." Our opinion is, therefore, that the pleas are good, and that the defendant is entitled to judgment.

MARTIN, B.—The only observation I have to make is, that the case of *Bell v. Wardell* has been evidently misunderstood. In *Blackstone's Commentaries*, vol. 2, p. 263, the case of *Abbot v. Weekley* is cited as good law; and it is expressly stated that such a custom is lawful. Therefore, assuming that *Bell v. Wardell* is at variance with *Abbot v. Weekley*, the latter case, being followed by *Fitch v. Rawling*, is an authority that such a custom is good. A great deal might be said to show that the judgment in *Bell v. Wardell* was given under an erroneous-

ous impression. A custom to be good *must have existed from the time of legal memory, that is, the reign of Richard the First, and whether the land which is subject to the custom was then pasture or arable, it is now impossible to ascertain; and I think the circumstance of the land being pasture or arable at the time when the alleged trespass was committed is immaterial in considering whether the custom is good. Judgment for the defendant.

GIBBINS v. BUCKLAND. *Jqn.* 31.

A claimant in ejectment is entitled to a writ of possession, notwithstanding the lease under which he claims, though in force at the time the action was commenced, has expired before the time of trial, unless the defendant shows affirmatively that the claimant has no title whatever.

THIS was a rule calling on the plaintiff to show cause why he should not be precluded from issuing or enforcing any writ of possession in this case.

The affidavits, in support of the application, stated that the plaintiff sought to recover possession of certain premises, comprised in and demised by an indenture of lease, dated the 26th of September, 1849, granted by Edward Thornton and William Griffith, executors of Edward Norton Thornton, to John Harris for the term of thirteen years from the 29th of September then next ensuing, less the last ten days thereof, which had been assigned to the defendant: that the plaintiff at the trial put in an indenture of lease, dated the 24th day of June, 1843, granted by Thomas Puckle to the said Edward Norton Thornton, of the said premises for the term of nineteen years and one quarter of another year from the 24th day of June, 1843, videlicet, to the 29th of September, 1862; and the plaintiff put in and proved an indenture of assignment, dated on or about the 18th of September, 1862, of the said last-mentioned lease from the said William Griffith, as the surviving executor of the said Edward Norton Thornton, to the plaintiff.

The Lord Chief Baron, before whom the cause was tried, *directed a verdict for the plaintiff, reserving to the defendant leave to move to enter the verdict for him. [*737]

The writ in the action issued on the 24th of September, 1862, and the cause was tried on the 10th of December.

In the present Term (Jan. 13) a motion was made to enter the verdict for the defendant pursuant to the leave reserved, (a) and refused. The defendant then took out a summons at Chambers, calling on the plaintiff to show cause why the *postea* should not be entered up on the record according to the provisions of the 181st section of the Common Law Procedure Act, 1852. The Lord Chief Baron, before

(a) The grounds of the motion were, first, that as the term granted by the lease of the 26th September, 1849, was "for thirteen years, wanting ten days, to be computed from 29th of September then next ensuing," the lease did not expire until the 19th September, 1863. Secondly, that the solicitor for the freeholder had declined to produce at the trial an agreement for a new lease to the defendant.

whom the summons was heard, declined to make any order; whereupon the present rule was obtained, against which

Joyce showed cause.—The plaintiff is entitled to issue a writ of possession. At the time he commenced the action he had a right to the possession of the premises, for the lease of the 24th of June, 1843, which was assigned to him, was then in force, but the lease of the 26th of September, 1849, which was assigned to the defendant, had expired on the 19th of September, 1862. The defendant was bound to show affirmatively that the plaintiff had no title whatever. It may be that he had an agreement for the renewal of his lease, or that he was tenant at will.

The Court then called on

Karslake, to support the rule.—The plaintiff is not entitled to issue *738] a writ of possession, for his lease expired before the *time of trial. That is provided for by the 181st section of the Common Law Procedure Act, 1852, which enacts that "In case the title of the claimant shall appear to have existed as alleged in the writ and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit." [MARTIN, B.—That section does not say that a writ of possession shall not issue.] It does, by implication, for judgment is to be entered for the costs only. Where the claimant's title has not expired, the form of the *postea* prescribed by Schedule (A.), No. 17, is that he "was, *and still is*, entitled to the possession of the land." [POLLOCK, C. B.—Though the plaintiff's lease has expired, his title does not expire unless his landlord demands possession.] If the plaintiff had claimed in his writ to be entitled on the day after his lease expired, the verdict must have been found against him. Though a tenant cannot dispute his landlord's title, he may show that it has expired. In an action for use and occupation it would seem that it is a defence that the plaintiff's title expired after the demise and before the period for which he claims, if there has been no eviction or surrender of possession by the defendant: *Mountnoy v. Collier*, 1 E. & B. 630 (E. C. L. R. vol. 72). If the plaintiff is entitled to recover, he might maintain an action against the defendant for mesne profits, and the defendant would also be subject to another action at the suit of the plaintiff's landlord. [MARTIN, B.—The defendant should have given up possession on the day his lease expired.]

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. The claimant's lease was in force at the time he commenced *739] the action, and though it had expired *at the time of trial, that did not put an end to his title, which is good against every one but his lessor. No doubt, if the lessor had demanded possession, he would have been entitled to it; but that he has not done: and therefore the claimant has a right to recover the possession from his tenant whose lease is at an end. The rule was granted upon the supposition that the affidavits would show affirmatively that the claimant's title was at an end; but they do not. Nothing has been adduced to show that the claimant is not entitled to possession; and it is clear that the defendant has no excuse for not having delivered up posses-

sion when his lease expired. The reversioner has not determined the claimant's interest by demanding possession from him, and whatever advantage possession might afford with reference to a renewal of his lease he is entitled to, and that right he is deprived of by the defendant's refusal to quit.

MARTIN, B.—I am of the same opinion, and indeed I think that the rule ought never to have been granted. I am satisfied that, if we were to adopt the view of the defendant's counsel, great injustice might be done. The claimant was assignee of a lease of certain premises, of which a sublease had been granted to the defendant, in which the precaution was taken of making the term in the sublease ten days less than in the lease assigned to the plaintiff. The defendant ought, therefore, to have given up possession at the expiration of his lease, and whilst the claimant's lease was in force; but he did not do so, and he now attempts to keep the claimant out of possession, it not having been possible to terminate the action within the ten days. If he could have succeeded, the consequence would have been that he would have deprived the claimant of a right which was bargained for at the time the sublease was granted to the defendant. But, in my opinion, the *defendant ought not, either in law or justice, to succeed. The law of estoppel, as between landlord and tenant, [*740 is, I think, applicable to this case; and we ought, so far as it lies in our power, to see that persons specifically perform these contracts.

With respect to the statute, the 181st section says that, in case the title of the claimant shall appear to have existed as alleged in the writ, but shall also appear to have expired before the time of trial, the claimant shall nevertheless be entitled to a verdict according to the fact, and to a judgment for his costs. It does not say that he shall not recover possession; and I think we are bound, so far as we can, to put the claimant in the position in which he would have been if the defendant had done what he ought, viz., given up possession when his lease expired.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. Where it appears at the trial that the claimant had the title alleged in the writ, it seems to me that it is not enough for the defendant to show that such title has expired, for the claimant may have acquired a new title. Suppose, for instance, a new lease has been granted, could it be said that the claimant has no title? I think, therefore, that the defendant ought to show affirmatively that the claimant is altogether without title, and that it is not enough to show that the title alleged in the writ has expired without negating the existence of a new title. Moreover, a lessee who retains possession after the expiration of his lease, is, until the acceptance of rent, tenant at will to the lessor, subject to the terms of the lease, so far as they are applicable. Therefore, in this case, the claimant has a good title against everybody except his lessor.

My brother Wilde, who has left the Court, desired me to say that he fully concurs with the rest of the Court. Rule discharged.

*741] *RIDLEY and Others v. SUTTON. Jan. 23.

The costs of examination upon interrogatories under the 1 Wm. 4, c. 22, of a witness about to go abroad, will not be allowed as costs in the cause where the depositions are rendered useless by the subsequent attendance of the witness at the trial.

THIS was a rule calling on the defendant to show cause why the Master should not review his taxation of the plaintiff's costs in the cause, as to the costs incurred in taking the examination of Henry Chapman, a witness on behalf of the plaintiff.

The action was brought to recover from the defendant, an underwriter, the amount of certain policies of marine insurance effected on a cargo of merchandise shipped on board a vessel which had been abandoned at sea on a voyage from Newfoundland. After issue joined, it was ascertained that Henry Chapman, one of the seamen on board the vessel at the time of her abandonment, was about to leave England on a voyage to Australia, and he was examined upon interrogatories on behalf of the plaintiff, under the 1 Wm. 4, c. 22, s. 4. A few days afterwards Henry Chapman sailed for Australia. In consequence of the difficulty in obtaining other evidence the cause did not come on for trial until the Liverpool Summer Assizes, 1862, when Chapman had returned to Liverpool, and was examined at the trial as a witness for the plaintiffs. The affidavit of the plaintiffs' attorney stated that, notwithstanding the attendance of Henry Chapman at the trial, his evidence before the Commissioner was put in by the defendant, and read by his counsel. This fact, however, was denied by the defendant's attorney.

The plaintiff having obtained a verdict, on taxation before the Master the defendant's attorney objected to the allowance of 6*l.* 6*s.*, being the costs incurred in taking the examination on interrogatories *742] of Henry Chapman, on the *ground that he was examined as a witness at the trial; and the Master disallowed the costs.

T. Jones showed cause.—The Master was right in disallowing the costs. *Curling v. Robertson*, 7 Man. & G. 525, decided that the successful party is not entitled to the costs of examining a witness upon interrogatories when such examination is not used at the trial. In that case the witness was not examined at the trial, but in this case he was, and therefore there is stronger reason for disallowing the costs. The Court will not interfere with the Master's discretion; *Cornet v. Dempsey*, 1 Dow. N. S. 422. [MARTIN, B.—The Masters of all the Courts say that the decision is right.]

Milward, in support of the rule.—By the 9th section of the 1 Wm. 4, c. 22, the costs of the examination of a witness by virtue of that Act are costs in the cause, unless otherwise directed by the Judge who made the order, or the Judge before whom the cause was tried. It was no fault of the plaintiff which rendered the depositions unavailable, but the unexpected return of the witness to this country, so that, by the 10th section of the 1 Wm. 4, c. 22, the plaintiff was precluded from giving them in evidence. In *Bridges v. Fisher*, 1 Bing. N. C. 510 (E. C. L. R. vol. 27), the costs were disallowed because the successful party obtained a peculiar benefit, by examining the witness under a commission instead of producing him before a jury. Here it

was for the advantage of the defendant that there was an examination upon interrogatories, otherwise he would have had to pay a large sum of money for the subsistence of the witness while he remained in this country: *Howes v. Barber*, 18 Q. B. 588 (E. C. L. R. vol. 83), *Evans v. Watson*, 3 C. B. 327 (E. C. L. R. vol. 54), *Dowdell v.* [*743 *The Australian Royal Mail Steam Navigation Company*, 3 E. & B. 902 E. (C. L. R. vol. 77). Moreover, the plaintiff's affidavit stated that the depositions were put in and read by the defendant's counsel.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged, and upon this ground, that where a witness is examined upon interrogatories for the security of the party who wishes the benefit of his testimony, and the witness appears at the trial, so that the examination is rendered useless, the party who has examined him cannot claim the expense of the examination. In discussing a question of costs, the Court only lays down some general rule for the directions of the Master, and leaves the details for the exercise of his discretion when the costs are taxed. No doubt, where an error has been committed the Court will rectify it, but, generally speaking, all they have to do is to lay down a general rule; and we think that where a witness who has been examined upon interrogatories appears and is examined as a witness at the trial, the costs which have been incurred for the safety and security of the party requiring his testimony ought not to be paid by the other party. It would be very proper, if it were possible, that a person should go to law and enforce a just claim or defend himself against an unjust one without incurring any expense, but every one who has any experience in these matters must know that there are many things which a prudent man would do for his own protection in his endeavour to enforce a just claim, for which it would be unjust to make the other party pay. Counsel continually recommend a particular course to be taken for safety, the cost of which ought not to fall upon the other party.

With respect to the Act of Parliament, 1 Wm. 4, c. 23, the 9th section provides that the costs of every rule or order *for the [*744 examination of witnesses shall be costs in the cause, "unless otherwise directed either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court." It seems to me that can only apply to a case where the examination becomes part of the evidence at the trial, for otherwise how can the Judge who tries the cause know anything about it? The Judge who is applied to for the order may very well say, "I will make it, but in my opinion it is unnecessary, and the costs shall not be costs in the cause." So if the examination is read at the trial, for the purpose of proving a fact, which, though material, might have been proved at far less expense, the Judge may direct that the costs of it shall not be allowed. But where the party who has examined the witness does not use his testimony at the trial, I think that the enactment which makes the costs of the examination costs in the cause, unless otherwise directed by the Judge who tried it, does not apply; and it seems to me that a reference to it by the opposite party is not such a user as to make it costs in the cause.

MARTIN, B.—I am of the same opinion. In a matter of this kind

I should feel reluctant to doubt the correctness of the decision of all the Masters of all the Courts, who state that this is the rule upon which they act; but on full consideration I think that it is perfectly right. The party who succeeds is entitled to all costs which are properly and necessarily incurred in prosecuting or defending the suit. But if a party thinks it advisable for his own security to have a witness examined upon interrogatories, and the witness is afterwards present and may be examined at the trial, so that the depositions become useless, it seems to me most unreasonable that the opposite party should be obliged to pay the costs of them. At the *745] time the rule was granted *my brother Bramwell expressed some doubt, and in consequence I have given the matter much consideration, and I am satisfied the Master is right.

CHANNELL, B.—By the 9th section of the 1 Wm. 4, c. 22, the costs of the examination upon interrogatories are costs in the cause, unless the Judge who made the order or the Judge who tried the cause shall otherwise direct. Here there was no direction by the Judge who made the order, nor could there be any by the Judge who tried the cause, for the reasons stated by the Lord Chief Baron. Before the 1 Wm. 4, c. 22, there was no means of getting these costs although the examination was given in evidence at the trial; and I think the Act intended to remedy that mischief, and to provide that the costs should be costs in the cause, where the examination was used as evidence.

WILDE, B.—I am of the same opinion. Rule discharged.(a)

(a) See *The Duke of Beaufort v. Lord Ashburnham*, 13 C. B. N. S. 598.

ALLWOOD v. HEYWOOD. Jan. 19.

A legal tenant for life has a right to recover from a contingent remainder-man the possession of the title-deeds.

DETINUE for title-deeds of the plaintiff.

Plea.—That the several deeds in the declaration mentioned are the title-deeds of and relating to certain land and messuages, with the appurtenances, at Astley in the county of Lancaster, which said land and messuages were, in his lifetime, the property of one John Allwood, deceased, who by his last will devised them to the plaintiff for the term of the natural life of the plaintiff, with remainder to the testator's *746] *child or children him surviving, in fee: that John Allwood, on, to wit, the 3d of August, 1857, died, without having revoked the said devise in his said will contained, and leaving (among other children) one child him surviving, to wit, one Alfred Allwood: that by virtue of the premises, Alfred Allwood then took and had a property and a right and title in and to the several deeds, and to the possession of the same respectively, and then and before the detention in the declaration mentioned, and before the commencement of this suit, to wit, on the day and year aforesaid, he, the said Alfred Allwood, obtained and had possession of the said several deeds in the declaration mentioned: that Alfred Allwood, by indenture bearing date the 17th of February, 1858, and made between him of the one part and the

defendant of the other part, and for the consideration in the said indenture mentioned, granted and conveyed unto and to the use of the defendant, his heirs and assigns, for ever, all the estate and interest of him the said Alfred Allwood of and in the lands and messuages, with the appurtenances, aforesaid: that under and by virtue of the said last-mentioned indenture and the premises aforesaid, the defendant then took and had property and a right and title in and to the said several deeds in the declaration mentioned, and to the possession of the same respectively: that thereupon Alfred Allwood (so being theretofore possessed of the said several deeds in the declaration mentioned as aforesaid), at the request of the defendant, then and before the detention in the declaration mentioned, and before the commencement of this suit, delivered the said several deeds in the declaration mentioned to the defendant, who then thereby obtained and hitherto hath the possession of the same respectively, as he lawfully might and may for the cause aforesaid, which is the detention in the declaration alleged: that the estate and interest of the defendant of and in the said lands and *messuages, with the appurtenances, is still subsisting in him, the defendant, and that the plaintiff's property [*747 in and right and title to the said several deeds in the declaration mentioned, was and is derived and acquired from and by reason of the said devise to him of the said life interest in the said lands and messuages, with the appurtenances, and not further or otherwise howsoever.

Demurrer, and joinder therein.

Replication.—That the plaintiff was and is the eldest son and heir at law of the said testator, John Allwood,* and that the said devise by the said John Allwood in the said plea mentioned is as follows:—“And I (meaning the said testator) give and devise my messuage or dwelling-house, with the rights, members, and appurtenances thereunto belonging, situate at Astley in the parish of Leigh, in the county aforesaid, together with the land” (meaning the said land and messuages in the said plea mentioned), “stock, and farming utensils thereto belonging. unto my son John” (meaning the plaintiff) “for the term of his natural life without impeachment of waste, and upon the determination thereof to my child or children him” (meaning the plaintiff) “surviving as joint tenants: Providing always, that if there should be only one child surviving my said son John or his survivors, then to such survivor and his or her heirs for ever.” That under and by virtue of the said devise the plaintiff became and now is the tenant for life in possession of the said messuage and land, and interested as therein mentioned.

Demurrer, and joinder therein.

Milward (Crompton Hutton with him), for the defendant.—It is conceded that the defendant has only a contingent remainder, which may be defeated by the death of Alfred Allwood in the plaintiff's lifetime; but having an interest *in the property he is entitled to retain [*748 possession of the deeds. No doubt, if a stranger had the deeds, the person in possession of the estate might compel their delivery to him; but there is no instance of an action by a tenant for life against the remainder-man to recover the deeds from him. Although at the time of the conveyance to the defendant he had no right to the posses-

sion of the deeds, yet, as they have come into his possession, they cannot be recovered from him: *Yea v. Field*, 2 T. R. 708. The plaintiff sustains no damage by not having the deeds, for he is in possession of the estate; and they are necessary for the defendant's title: *Lord Buckhurst's Case*, 1 Rep. 1. In *Foster v. Crabb*, 12 C. B. 136 (E. C. L. R. vol. 74), it was laid down that he who has occasion to use a deed is legally entitled to the custody of it; and where several are equally interested in it, either having possession may retain it against the others. In *Viner's Abridg. tit. Feits (Z)*, pl. 15, it is said:—"If land be given to A. for life, remainder over to several by deed, any one of those who first gets the deed shall retain it." [MARTIN, B.—That proposition is at variance with the authorities referred to in Mr. Thomas's note to *Lord Buckhurst's Case*.]

Mellish (Baylis with him), for the plaintiff.—As against the plaintiff the defendant has no right to the deeds, for he has merely a contingent remainder in the estate. According to the argument for the defendant, where an estate is conveyed in strict settlement, any one having an interest in it however remote, if he happens to get possession of the title-deeds, is entitled to retain them. But that is not law. The person for the time being seised of an estate of freehold in possession is entitled to the deeds. The proposition cited from *Viner's Abridg. *749 tit. Feits (Z)*, pl. 15, cannot be *supported. In *Sugden's Vend. and Purch. ch. 11, s. 5*, note (1), it is said, that "as regards persons claiming several interests in the same estate, the tenant for life is entitled to the custody of the deeds." A purchaser from a contingent remainder-man is not even entitled to an inspection of the title-deeds in the possession of the tenant for life: *Noel v. Ward*, 1 Mad. 322. *Garner v. Hannington*, 22 Beav. 627, is also an authority that the legal tenant for life is entitled to the custody of the title-deeds.—(He was then stopped by the Court.)

Milward, in reply.—In *Foster v. Crabb*, 12 C. B. 136 (E. C. L. R. vol. 74), the doctrine laid down in *Viner's Abridg. tit. Feits (Z)*, pl. 15, is cited in a considered judgment of the Court of Common Pleas, and recognised as law. It is also there said that although the case of *Yea v. Field*, 2 T. R. 708, has been questioned in the Courts, it was properly decided.

POLLOCK, C. B.—There must be judgment for the plaintiff. It is but reasonable that, being the legal tenant for life, he should have the custody of the title-deeds.

MARTIN, B.—The law seems correctly stated in Mr. Thomas's note to *Lord Buckhurst's Case*.

CHANNELL, B., and WILDE, B., concurred.

Judgment for the plaintiff.

*THE ATTORNEY-GENERAL v. M'LEAN. Jan. 20. [*750

The words "reside or be" in the Assessed Taxes Act, 43 Geo. 3, c. 161, ss. 25, 26, do not necessarily mean "dwell" or "sleep." Section 27 imposes the obligation upon one, who in person carries on business, to make a return in the parish in which his place of business is situate, whether he sleeps there or not, of articles liable to duty kept, but not returned, elsewhere.

One penalty only is incurred by the omission in any one year to return several lists, and to make the return in several places.

INFORMATION by the Attorney-General for penalties, under the 43 Geo. 3, c. 161, s. 37,(a) and the 16 & 17 Vict. c. 90, for not making a return in the parishes of St. Bride and St. Marylebone, of a male servant, carriage, horse, and dogs, kept by the defendant at Chertsey.

The information stated that Charles M'Lean, at the time appointed by the statute in such case made for delivering the several lists in this and the three several counts next following mentioned, *resided and was* in the parish of St. Marylebone, in the county of Middlesex, and that the said Charles M'Lean was then liable to a certain duty of assessed taxes, payable by him to her Majesty, in and for the year ending the 5th of April, A. D. 1861, in respect whereof a list and declaration ought to have been delivered by him, according to the form and directions of the said statute, to the assessors of the said duty for the said parish of St. Marylebone, to wit, in respect of certain male servants employed by him at the parish of Chertsey, in the county of Surrey, during the year preceding, which ended on the 5th of April, A. D. 1860.—Averment: that all times and things and conditions necessary for enabling the said Charles M'Lean to deliver such list and declaration had elapsed and taken place: Yet the said Charles M'Lean neglected to deliver, *and did not deliver, such a list [*751 or declaration to the said assessors according to the directions of the said statute, contrary to the form of the said statute, whereby the said Charles M'Lean had forfeited for his said offence the sum of 50*l*.

The 2d, 3d, and 4th counts were similar to the first, but the taxable articles, of which it was alleged that no return had been made, were in the second count stated to be a carriage, in the third count a horse kept for the purpose of riding or drawing a carriage liable to duty, and in the fourth count three dogs. A second set of four counts followed, which differed only from the first in substituting the parish of St. Bride for the parish of St. Marylebone.

Plea.—Not guilty.

The case was tried, before Wilde, B., at the sittings after Trinity Term, 1862, when the following facts appeared:—The articles liable to duty, specified in the information, were kept and used by the defendant during his residence at Chertsey, where, during a part of the tax year, ending on the 5th of April, 1860, he was residing with his family, but before that date had ceased to reside there. Since that date it did not appear where he had slept, or where his family had resided. During the six weeks succeeding the 5th of April, 1860,

(a) The 16 & 17 Vict. c. 90, repeals the duties of assessed taxes which previously existed and imposes new duties; but the 3d section of that Act preserves and embodies the machinery of the Acts then in force for collecting and enforcing the taxes, so that the sections of the 43 Geo. 3, c. 161, which are here material, remain unrepealed.

within which time the return is by the 43 Geo. 3, c. 161, s. 27, required to be made, as well as before and afterwards, the defendant carried on business as a carver and gilder in two places; one in Fleet Street, in the parish of St. Bride, the other in Oxford Street, in the parish of St. Marylebone. His ordinary practice was to attend daily at one or other of these places of business. He was assessed to these premises for the house duty. It was proved that the usual notices were affixed, as required by the 43 Geo. 3, c. 161, s. 25, on the church doors of the parishes of St. Marylebone and St. Bride, but no notice was left by the *752] assessors *at either of the defendant's places of business. The defendant made no return anywhere of the articles which formed the subject of the information, and refused to pay the duties, but after the period for making the return had expired, he did make a return of certain other articles to the assessor for the parish of St. Bride. The jury, under the direction of the learned Judge, found a verdict for the Crown for the four penalties claimed; leave being reserved to move to enter the verdict for the defendant, or to reduce the amount of the verdict to 50*l.*, in respect of one penalty.

Hayes, Serjt., in Michaelmas Term, obtained a rule nisi accordingly, on the ground, first, as to entering the verdict for the defendant, that the defendant, not residing either in the parish of St. Marylebone, or the parish of St. Bride, was not liable to the penalty for not sending in a list there; secondly, as to reducing the verdict, that, under the 37th section of the 43 Geo. 3, c. 161, the defendant was only liable to one penalty.

The Attorney-General, Loeke, and Bearan showed cause.—First, the defendant is liable upon this information to one penalty, at the least, for not making the return in either of the parishes, where he in person carried on his business during the period specified by the 43 Geo. 3, c. 161, s. 27. The question of liability depends on whether the defendant “resided or was” in either of these parishes within the meaning of the 25th and 27th sections of that enactment. By the 25th section, (a) the general notices *affixed to the church door of the *753] parish are notice to all persons “residing or being” within the parish of the time within which the returns are required to be made. By the 27th section, (b) the obligation is imposed on every person,

(a) Section 25 enacts:—“That the assessors for the time being shall . . . within twenty-one days after the commencement of the respective duties for each year, cause *general notices* to be affixed on the doors of the church or chapel, or market-house or cross (if any) of the city, town, parish, or place for which such assessor shall act; and if such place shall not have a church or chapel, or market-house or cross, then on the nearest church or chapel door of any adjoining parish, requiring all persons residing in the said city, town, parish, or place, who are by this Act required so to do, to make out and deliver to the respective assessors, within fourteen days after the date of such notice, such lists or declarations as are herein required; and such general notice shall from time to time when the same shall be affixed, be deemed sufficient notice of the time within which such returns shall be required to be made in each year, to all persons residing or being in such city, town, parish, or place, and the affixing the same in the manner before directed shall be deemed good service of such notice to all persons within the limits of such city, town, parish, or place,” &c.

(b) Sect. 27 enacts:—“That every person who shall have retained or employed any male servant or servants, or other male person or persons herein described or mentioned, or kept any carriage, horse, mule, or dog . . . in the course of the year ending on the day next before the respective days appointed for the commencement of the said duties in the year 1804, shall before the end of six weeks thereafter, whether any previous notice for that purpose shall have been delivered or not, cause to be prepared true and particular lists in writing, signed by such

*who has kept taxable articles during any part of the preceding tax year, to deliver one or more lists of those articles to the assessor of the parish where he shall "reside or be" within six weeks after the 5th of April, 1804; and by the 28th section the provisions of the 27th section are made to apply in every subsequent tax year. In construing the language of the legislature no uniform meaning has been assigned to the word "residence." Its signification has varied with the context and the object in view: *Blackwell v. England*, 8 E. & B. 541 (E. C. L. R. vol. 92). The object here is to afford the opportunity of seeing the public notice. That object is better attained by affixing it on the church doors of the parishes where the defendant conducts his business, than where he sleeps. [WILDE, B.—The only return which the defendant in fact made was made in one of these parishes. MARTIN, B.—That is strong evidence that he "resided or was" there.] Whatever ambiguity may attach to the word "reside," no reasonable meaning can be assigned to the word "be" which would not include the place where a person conducts his business. He cannot evade the return by concealing the place where he sleeps.

Secondly, a separate penalty was incurred for each list of which the return was omitted. The 27th section requires a distinct *list* to be delivered to the assessor for each of the several classes of articles which it subjects to taxation; and for the omission to deliver a list the 37th section(a) imposes *a 50*l.* penalty, over and above the [*755 duty chargeable. It is not of course contended that each list need be on a separate paper. [CHANNELL, B.—The 37th section contains several alternatives, for all of which there is but one penalty. POLLOCK, C. B.—Can any instance be cited of cumulative penalties, where the legislature has not used language which in terms imposes a specific penalty for every such offence?] At all events two penalties were incurred. An obligation existed to make the return in each parish where the defendant carried on his business. [WILDE, B.—The obligation is one and complete in itself, viz., to make the return in every such parish. The penalty incurred by the omission to do so is 50*l.*]

person, on his or her behalf, which shall contain the parish or place, and the parishes or places where such persons shall then or usually reside, and one of such lists shall also contain the greatest number of male servants retained or employed by such persons Another of the said lists shall contain the greatest number of carriages, mentioned or described in the schedules annexed to this Act, kept by such person at any one time within the like period Another of the said lists shall contain the greatest number of horses, &c., kept and used by such person for the purpose of riding, or drawing any carriage chargeable with the duty made payable by this Act, at any one time within the like period Another of such lists shall contain the greatest number of dogs kept by such person within the like period And every such person shall deliver or cause such lists to be delivered to the assessor or assessors of the said duties for the district, parish, or place, where such person shall reside or be, or leave, or cause the same to be left at his or their dwelling-house or houses or one of them, at or before the expiration of the time appointed by this Act for the delivery thereof," &c.

(a) Sect. 37 enacts:—"That if any person liable to the said duties, or any of them, in respect whereof a list or declaration ought to be delivered, or coming within any of the exemptions contained in this Act, shall neglect to deliver a list or lists, or a declaration or declarations, according to the directions of this Act, in every parish or place where the same ought to be delivered, or shall omit any person, or any description, article, matter, or thing, which ought to be contained therein according to this Act, or shall make an untrue return of any particular therein, *he or she, so offending, shall forfeit and pay the sum of 50*l.*, over and above any duty chargeable as aforesaid.*"

The second point was then abandoned by the Crown.

Hayes, Serjt., and H. Matthews, in support of the rule.—The first point only need be discussed. The defendant admits his liability to be surcharged for non-payment of the duties, but he denies that he has incurred a penalty under the 27th section by not making a return at his place of business. The Crown has relied on the words “reside or be.” First, as to the word “reside.” The ordinary meaning of “reside” is “dwell” or “inhabit.” By the 27th section of the Reform Act (2 Wm. 4, c. 45), the right of voting in a borough is given to every person who, as owner or tenant, shall *occupy* a house, warehouse, counting-house, *shop*, or other building of the value of 10*l.*, subject to the proviso that no such person shall be registered, unless he shall have *resided* for a specified time within a certain distance of the borough. The distinction is thus drawn by the legislature between “the occupation of a shop” and “residence.” In the 26th(a) and 27th *756] sections of the 43 Geo. 3, c. 161, the context *shows that the word “reside” is used as an equivalent expression for “dwell.” It is said, however, that this word should be construed by the object in view, viz., that the person to be affected by the notice may see it. He is more likely to do so on a Sunday in the parish where he sleeps, than on a week-day where he transacts his business. Secondly, as to the word “be.” Either it has no definite meaning as distinguished from the word “reside,” which construction is favoured by the circumstance that the notice, framed under the 25th section, requires only residents to make the return; or else it refers to a casual residence at an hotel or lodging, as distinguished from the ordinary residence. Again, it is not “every person,” but “every such person” who is required by the 27th section to deliver lists to the assessors. These words must refer to the class of persons previously mentioned, viz., “The occupiers of dwelling-houses, or distinct apartments.” But the Crown is not without a remedy. The Act provides machinery for obtaining the return, which is expressly adapted to the present *757] case. Section 39(b) imposes *the obligation on persons who keep taxable articles, *where they have no residence*, to make the

(a) Sect. 26 provides:—“That besides such general notices as aforesaid, the said respective assessors shall, within the respective periods before mentioned in every year, give or leave at every dwelling-house where any person liable, or supposed to be liable to the duties hereby made payable . . . shall usually reside within the limits of the places for which such assessors act, one notice to and for the occupier thereof; and where such dwelling-house shall be let in different apartments, and occupied distinctly by different persons or families, a like notice to and for the occupier of each distinct story or apartment, provided any person liable, or supposed to be liable as aforesaid, shall reside there; and also a like notice to and for every person so liable then residing in such dwelling-house as a lodger or inmate within the knowledge of such assessor or assessors, requiring such persons respectively to prepare and produce within twenty-one days next ensuing the date of such notice, a list or lists, or declaration or declarations, in writing in the forms and in the manner hereinafter required.”

(b) Sect. 39 enacts:—“Whereas divers persons may retain or employ servants, or keep carriages, horses, mules, or dogs at places where they themselves have no houses or places of residence, and other persons liable to the duties made payable by this Act, or some of them, may come into or to reside in places after the time appointed by this Act for returning the lists before mentioned, not having been charged therein, or may have no fixed place of residence:” —“That in every such case it shall be lawful for the assessor or assessors, surveyor or surveyors, inspector or inspectors, within and for such districts or places respectively, at any time or times, and they are hereby strictly required and enjoined in every case within their knowledge respectively, to deliver or leave such notices as are hereinbefore directed to be given, at the house or houses where such persons shall reside or be, or where such servants, or other male persons

return in the place where the **articles were kept*, if a notice has been left there, as the section requires. [CHANNELL, B.—The [*758 period during which the articles were kept, and the period of the defendant's residence there, were in this case co-extensive.] That circumstance would be no defence if the Crown proceeded under that section. Before the expiration of the tax year, in which the articles were kept, the defendant had left his residence. Section 34(a) imposes a similar obligation on persons who have several places of residence. The construction for which the Crown contends would deprive the defendant, if assessed at his place of business, of the ground of appeal given by the 30th section.(b) [WILDE, B.—No assessment **can* [*759 be made under that section, except where a notice has been

*before described, carriages, horses, mules, or dogs, shall be kept; and all and every such persons, and also all and every person or persons having the care, superintendence, or management of such servants or other male persons before described, carriages, horses, mules, or dogs, shall deliver, or cause to be delivered such list or lists as aforesaid, signed by them respectively, conformably to the directions hereinbefore contained, to the assessors, surveyors, or inspectors, within and for the respective districts or limits where any such servants, carriages, horses, mules, or dogs, are or shall be kept, or where such persons shall then reside or be, within twenty-one days after the delivery of such notices, and shall also deliver to them respectively a declaration where they, or the persons to whom such servants, or other male persons before described, carriages, horses, mules, or dogs, do belong, have been assessed for that year to the duties hereby made payable, together with the usual place or places of abode of themselves, or of the persons to whom the servants, or other male persons before described, carriages, horses, mules, or dogs under their care, superintendence, and management, do belong, and the names of such persons; or in case no such assessment, or no sufficient assessment, shall then have been made, then where they or the persons to whom such servants or other male persons before described, carriages, horses, mules, or dogs do belong, shall have delivered their lists, in order to their being so assessed under the like penalties, as are herein imposed on persons chargeable with the said duties for not delivering lists in the parishes and places where they respectively reside; and every person who shall appear by such return or otherwise, not to have been assessed in the full sum of which he or she ought to be assessed, or not to have returned the lists hereby required for the purpose of being so assessed in some other parish or place in Great Britain, or who shall not make any such return, may be chargeable to all the said duties by this Act made payable, and for which returns ought to be made either in the parish or place where such last-mentioned notice shall have been delivered in like manner as if such person actually resided in such parish or place, or in the parish or place where such persons shall have their ordinary residence; and if any person, on whom such notice shall have been served, shall remove from such parish or place without having delivered such list or declaration, he or she shall forfeit the sum of 50*l*."*

(a) Sect. 34 enacts:—"That every person who shall have divers places of residence within any part of Great Britain, or shall keep any servants, or other male persons herein described, carriages, horses, mules, or dogs, at divers places within Great Britain: and every person being an inmate or lodger at the time of such notices being given as aforesaid, and having an ordinary residence at some other place or places whereat, or at one of which places such person ought to be charged, shall be obliged to deliver all such lists as aforesaid at each and every such places," &c.

(b) Section 30 enacts:—"That if any person shall neglect or refuse to make out, sign, and deliver such lists as are herein directed, or any of them, within the respective times herein mentioned, then the assessor or assessors shall, from the best information he or they can obtain, make an assessment upon such person so refusing or neglecting for or in respect of every servant, carriage, horse, mule, or dog retained or kept by him or her as aforesaid . . . according to the rates specified in the said schedules, and shall include the same in the certificate of the assessment to be delivered to the Commissioners as herein directed; and every such assessment so made upon any such neglect or refusal shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he or she was not at his or her dwelling-house at the time of delivery of such notice, nor between that day and the time limited for delivering such list as aforesaid to the assessor, or unless such person shall allege and prove such other excuse for not having delivered his or her list, as the Commissioners for executing this Act shall in their judgment think reasonable and sufficient."

served at a dwelling-house, as required by the 26th section, which section does appear to be confined in its operation to dwelling-houses. But the general notice, to which the 25th section refers, may well have a more extended operation.] Lastly, the information is not proved. It avers that the defendant "resided *and* was" in the parish where he carried on his business. The averment that he "resided" is material, and was not proved. [CHANNELL, B.—If that averment be struck out, the allegations would be, that the defendant was in the parish, and that he was there liable to duty. The conjoint effect of the two allegations would be, that he was so there as to be liable to duty.] The duty which is imposed on the defendant is in the alternative, viz., to make the return where he "resides" or where he "is." The evidence should have negatived both branches of the alternative. [WILDE, B.—It was conceded at the trial that no return was made anywhere within the period which the Act specifies.] That would not cure the information, which alleges an absolute, not an alternative, duty. Section 27 is satisfied by a return in one place only. It can scarcely be contended that a return at the place of business would render a return at the residence unnecessary.—They referred also to the 9th section.

POLLOCK, C. B.—The claim to recover more than one penalty having been abandoned by the Crown, it is not necessary that we should hear the Attorney-General in reply.

The form which the legislature uniformly adopts when the intention is, that for each and every violation of an Act *of Parliament, there shall be a distinct penalty, is to impose a penalty by express words "for each and every offence." Of this the Excise Acts afford a familiar illustration. No authority has been produced on behalf of the Crown to show, that for distinct offences, committed at the same time, cumulative penalties may be claimed and recovered, where no such words occur in the clause imposing the penalty. We are therefore all of opinion that so much of the rule as prays that the verdict may be reduced to 50% should be made absolute.

With regard to the question of entering the verdict for the defendant, on the ground that he is not liable under the Act to any penalty, the rule must be discharged. The words of the Act, on the construction of which the defendant's liability depends, are "residing or being." The word "being" has, in my opinion, been introduced advisedly, that the ambiguous character of the word "residing" might never be relied upon to prevent the recovery and collection of the tax. Undoubtedly the word "be" is of the widest import. Thus a commercial traveller may in one sense be said to "be" in every county or parish through which he travels in the performance of his duties. But the legislature, no doubt, considered that this word would receive a judicial construction, founded upon what was reasonable. The true mode of interpreting it was, in my opinion, suggested by my brother Channell in the course of the argument, viz., where a man shall "be" or "abide," *so as to be liable to duty*.

It appears that in Fleet Street the defendant has a house, not merely a shop, but an ordinary place of residence. It may be he does not sleep there; it may be he sleeps elsewhere, and lets out the upper part of the house to lodgers; but there he certainly "is," occupying a

house, and using the lower part as a shop in the exercise of his business. He is *charged with not having delivered lists to the assessor according to the directions of the Act, and the 27th section is imperative that he shall do so. By the 25th section, the notices affixed on the church doors in the parishes of St. Bride and St. Marylebone are respectively notice to him, because, in the words of that section, he is "residing or being" there; and, by the 27th section, the lists are to be delivered to the assessor by every person, where every person shall "reside or be." If the word "be" has any meaning, it must include that abiding which consists in the occupation of a shop for the purposes of business. It is true there are other sections of the Act which point to particular cases, such as the making returns where the articles subject to duty are kept, or the making returns where the person sought to be charged has no fixed residence. But this does not prevent the operation of the 27th section, where it in terms applies and makes it imperative on the defendant, having received notice, to return the lists to the assessor of the district where he "shall reside or be." I am clearly of opinion, that, for the purposes of this Act, the word "reside" does not necessarily mean "dwell," for, when the Act speaks of a place where people live and sleep, the word dwelling-house is used, as will be seen in the 32d section, which enacts "that every occupier as aforesaid in whose dwelling-house or apartment any person liable to the duties shall reside," &c. I am, therefore, of opinion that the language of the enactment shows that it was a duty incumbent on the defendant to make a return to the assessor of St. Bride of the articles which he kept and used, and that having failed to do so he is liable to the penalty; but I think he is liable to one penalty only. The rule must be absolute to reduce the verdict in that respect, and so much of it as relates to entering a verdict for the defendant must be discharged.

*MARTIN, B.—I am also of opinion that there was evidence for the jury that the defendant "resided or was" in the parish of St. Bride within the true meaning of the 27th section, and this is the only point which it is necessary to discuss. The evidence was that he kept a shop as a tradesman, trading in the parish of St. Bride; that he was there in the course of the day, as long as he thought convenient, and that he made a return in that parish in respect of other matters, in which he admitted he was liable to duty. No evidence was given as to where he slept at night. Upon this evidence my brother Wilde had to decide whether there was, or was not, any evidence for the jury. The question here is not one of law, but of fact. With regard to the word "reside," it is to be observed, that inasmuch as all persons in England are to be assessed to these duties where they are liable, and the object of the Act is to obtain them from all persons who are liable, it is, so far as the Crown is concerned, wholly immaterial whether the defendant makes the return where he sleeps or where he spends the day in the conduct of his business. If, therefore, it were necessary to give judgment upon the meaning of the word "reside" alone, without the words "or be," there would, I think, on the authority of *Blackwell v. England*, 8 E. & B. 541 (E. C. L. R. vol. 92), be strong ground for contending that one who spends the day at his shop attending to his business, and may there be seen and con-

versed with on matters of business, and does not choose to be communicated with elsewhere, is "residing" there, much more than at the place where he sleeps at night, but does not wish any one to call on him, and where, if any one does call, he cannot see him during the day. Again the word "be" is conclusive. A man is not in Fleet Street, within the meaning of this Act, simply because he walks from Temple Bar to St. Paul's; but a man who is staying, abiding, and *763] to be found there, so that if any one desired to see him on business he would go there to see him, must be said to "be" there. That would, both according to ordinary good sense and the meaning of this section of the Act, be the place where he resided. I think, therefore, there was not only evidence for the jury, but evidence on which a jury ought to act, that the defendant "resided and was" in the parish of St. Bride in the city of London. It appears to me plain, from the language of the 27th section, that the duty is imposed on those who are subject to this tax to make the return. If they make no return at all, the place where they are is a circumstance which is not material. In substance, therefore, there can be no doubt that the defendant is liable to this penalty; and I agree that there is one penalty only, for the reasons stated by the Lord Chief Baron.

CHANNELL, B.—I concur with the Lord Chief Baron and my brother Martin, in thinking that for the reasons given so much of the rule as seeks to reduce the penalty from 200*l.* to 50*l.* should be made absolute, and the rest of the rule be discharged.

WILDE, B.—I am of the same opinion. The point raised is purely technical. The defendant contested his liability to duty in respect of a certain carriage and horse, and refused to pay. The jury found a verdict against him, because by law he was liable and had incurred the penalty. The point on which he now relies is, that although he has made no return anywhere of the articles which it was his duty to return, he is not liable under this information, on the ground that he was only under an obligation to make the return at the place where he slept, and not where he carried on his business. For the reasons which have been given by the Lord Chief Baron, which have *764] exhausted the question, I am clearly of opinion that he was bound to make the return, not only at the place where he slept but at the place where he carried on his business. I think, therefore, that the rule should be absolute to reduce the penalty to 50*l.*, but that the remainder of the rule should be discharged.

Rule accordingly.

CAINE and Another v. COULTON. Jan. 13.

The plaintiffs' attorney wrote to the defendant requesting him to remit a balance due to the plaintiffs, with 13*s.* 4*d.* costs. The defendant sent a bank bill for the amount of the balance only. The plaintiffs' attorney wrote in answer that he would not receive the bank bill, unless the 13*s.* 4*d.* was paid, but did not return it. The jury having found that any objection to the remittance not being in money was waived, and that the bank bill was only refused because it did not include the costs:—Held, that there was evidence of payment.

ACTION for goods sold and delivered.

Plea.—Payment before action.—Issue thereon.

The cause was tried, before the Assessor of the Court of Passage at Liverpool, when the following facts appeared:—The plaintiffs, who were ironmasters at Liverpool, sought to recover 32*l.* 4*s.*, being the balance of their account for goods supplied to the defendant, who was a hardwareman at North Shields. On the 6th of June, 1862, the plaintiffs' attorney wrote to the defendant demanding payment of the 32*l.* 4*s.* and 5*s.* 1*d.* for his costs. The defendant remitted to the plaintiff 13*l.* 3*s.* 6*d.* On the 9th of June the plaintiffs' attorney wrote to the defendant as follows:—

"Sir.—Messrs. Caine and Kitchen inform me that you have sent them 13*l.* 3*s.* 6*d.* The balance now due from you to them is 19*l.* 2*s.*, inclusive of 1*s.* 6*d.* noting the dishonoured bill. Unless the balance, with 13*s.* 4*d.*, my charges, be remitted by return, I shall sue you."

On the 12th of June the defendant remitted to the plaintiffs' attorney a bank bill for 19*l.* 2*s.*, payable at sight. On the 13th of June the plaintiffs' attorney again wrote to the defendant saying:—"The credit has expired, and I decline to receive the draft sent, unless you remit me 13*s.* 4*d.* for letters and attendance." The defendant, not having remitted *the 13*s.* 4*d.*, was served with the writ in this action. The plaintiffs' attorney retained the bank bill, but did [*765 not cash it.

The learned Assessor left it to the jury to say, first, whether the plaintiffs had waived any objection they might have had on account of the remittance not having been made in cash, and had only insisted on the payment of the attorney's claim in addition to the sum really due. Secondly, whether the defendant was prevented from sending cash by the course of dealing of the plaintiffs.

The jury found that the plaintiffs objected only because 13*s.* 4*d.* was not included in the remittance, and that they did not object to receive the order as so much cash. They also answered the second question in the affirmative. The learned Assessor then ruled that the facts proved were evidence of payment, and he directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter the verdict for them for 19*l.* 2*s.*

Milward, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground of misdirection in the learned Assessor holding that the facts proved showed payment, or afforded evidence to support the plea of payment; against which

C. Russell now showed cause.—The ruling of the learned Assessor was correct; for the bank bill was accepted as cash and retained by the plaintiffs' attorney, so that there was in fact a payment. It is true that the defendant was requested to remit the 19*l.* 2*s.*, together with 13*s.* 4*d.* for the attorney's charges; but, the latter being an illegal demand, the defendant had a right to reject that part of the letter and act upon the rest. In *Gordon v. Strange*, 1 Exch. 477,† the defendant, in answer to a letter from the plaintiff demanding payment of a debt, sent a post-office order, which the plaintiff *retained but [*766 did not cash, and that was held no evidence of payment. But that decision proceeded on the ground that the creditor was described in the post-office order by a wrong name. In *Hough v. May*, 4 A. & E. 954 (E. C. L. R. vol. 81), the defendant sent to the plaintiff a check which purported to be drawn for the balance of his account,

and on that ground it was held no payment, although retained by the plaintiff, for a check to operate as payment must be unconditional. Here, although the plaintiffs' attorney wrote to say that he would not accept the bank bill unless his charges were paid, he nevertheless retained it. The delivery of a negotiable instrument may operate as payment, if accepted as such: *Kearslake v. Morgan*, 5 T. R. 518, *Pearce v. Davis*, 1 Moo. & R. 865. The defendant was requested to remit the balance and he did so, and no objection was made to the mode in which it was remitted: *Warwick v. Noakes*, Peake 98. A tender of country bank-notes or a check is good, if the creditor does not object to the form of the tender but only to the amount: *Polglass v. Oliver*, 2 C. & J. 15;† *Jones v. Arthur*, 8 Dow. P. C. 442.†—He also referred to *Kington v. Kington*, 11 M. & W. 233;† *Price v. Price*, 16 M. & W. 232;† *Griffiths v. Owen*, 13 M. & W. 58;† *Morrison v. Summers*, 1 B. & Adol. 559 (E. C. L. R. vol. 20); *Thomas v. Cross*, 7 Exch. 728.†

Milward, in support of the rule.—There was no evidence of payment. The plaintiffs' attorney was entitled to his charge for letters and attendance, so that the amount due at the time the writ issued was the debt *and costs*. The defendant was requested to remit the money, but he sent a bank bill for the debt only. The plaintiff had *767] a right to *treat that as a nullity and commence his action. In *Hough v. May*, 4 A. & E. 954, 957 (E. C. L. R. vol. 31), *Little-dale, J.*, said that the plaintiffs "were not bound to suspend the commencement of the action until they had returned the check." In *Gordon v. Strange*, 1 Exch. 477,† although the plaintiff kept the post-office order, knowing that he might at any time receive the money, it was held that there was no evidence of payment.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. The difference between *Gordon v. Strange* and this case is of the very essence of the question. Here the defendant was desired to *remit*, and he did remit, the balance; and it was left to the jury to say whether the plaintiffs had waived any objection which they might have had on account of the remittance not having been made in cash, and the jury decided in favour of the defendant. In *Gordon v. Strange* there was no request to *remit*, and the remittance was not available, because a mistake was made in the name of the party to whom the post-office order was sent. So, in *Hough v. May*, there had been no direction to remit, and the remittance was by a check which contained in the body of it a statement which might have been some evidence against the person to whom the check was sent, if he had presented it, and which the party sending it had no right to insert. In the present case there was a direction to remit, and a remittance, the effect of which was left to the jury, who decided in favour of the defendant, and I think we ought not to disturb the verdict.

MARTIN, B.—I am of the same opinion. Indeed, it seems to me *768] that the matter is disposed of by the finding *of the jury. If a debtor has not paid his debt in the usual course, and the creditor is obliged to employ an attorney to enforce payment of it, I do not think it unreasonable that the attorney should say, "Remit me the money, with 6s. 8d., the costs of this letter." Neither do I think that any blame can be imputed to an attorney for so writing. But all that

is due is the debt—the claim for writing the letter is no claim by the creditor. Here the defendant remitted to the attorney a bank bill payable at sight, which is an ordinary mode of payment, and the attorney had no right to keep it and then proceed as if he had never received it. I think there was evidence for the jury of payment, for, although the attorney said he would not accept the bank bill unless 13s. 4d. was remitted, he nevertheless kept it. It is a rule of common law, as well as common sense, to look at what is done, not at what is said. A man cannot deal with the property of another, and then turn round and say he never meant to do it. It seems to me that the learned Assessor would have done wrong if he had not left the question to the jury.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The application is not for a new trial on the ground that the verdict is against the evidence, but to enter a verdict for the plaintiffs for 19l. 2s. I think we ought not to accede to that application, provided there was any evidence to warrant the Judge in leaving the case to the jury; and in my opinion there was. The case of *Gordon v. Strange*, 1 Exch. 477,† which has been relied on by Mr. *Milward*, is clearly distinguishable from the present, for the reasons stated by the Lord Chief Baron. There the application was for the payment of money; for, according to the report *in the Jurist, [769 Vol. 11, p. 1019, Parke, B., in his judgment said:—"Suppose, instead of cash, the defendant had paid this money by a quantity of coals or cider, and left them at the plaintiff's house, would it support a plea of accord and satisfaction that the plaintiff did not take the trouble to send them back?"

WILDE, B.—I am entirely of the same opinion.

Rule discharged.

BRUCE v. JONES. Jan. 24.

Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss, the assured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy.

Therefore where a shipowner effected upon the same ship four policies of insurance, in which respectively the agreed value of the ship was stated to be 3000l., 3000l., 5000l., and 3200l., and upon a total loss received under the three former policies sums amounting to 3126l. 13s. 6d., and then sued upon the latter policy:—Held, that, as between the assured and the underwriter of that policy, the value of the ship must be taken to be 3200l., and the assured was only entitled to recover the difference between that sum and 3126l. 13s. 6d.

DECLARATION on a policy of insurance for 2400l. on the ship "Hero," on a voyage from Cardiff to Manilla, and in which the ship was valued at 3200l. and underwritten by the defendant for 125l. The declaration alleged a total loss.

Plea (inter alia).—That the plaintiff made other policies of insurance on the same ship on the same voyage, viz., a policy dated the 30th of July, 1860, in which the said ship was valued at 3000l., which said policy was underwritten for sums amounting altogether to 725l.; a policy, dated the 8th May, 1861, in which the same ship was valued at 3000l., and the policy underwritten for 500l.; a policy, dated the

20th June, 1861, in which the same ship was valued at 5000*l.* and underwritten for the sum of 3450*l.*—Averments: that the said ship mentioned and insured in each of the said policies was the same ship, *770] and the risk intended to be *covered the same risk: that the said ship was lost after the making of the said policies, and that divers of the said several insurers upon the said ship, whose names were subscribed to the said policies other than the policy in the declaration mentioned, paid to the plaintiff, and the plaintiff accepted and received of and from the said underwriters, sums amounting altogether to the sum of 3200*l.*, and the plaintiff then and thereby became satisfied and indemnified for the said loss of the said ship as agreed upon in the said policy in the declaration mentioned.—Issue thereon.

At the trial, before Willes, J., at the last Liverpool Summer Assizes, it appeared that the policy in question, which was dated the 6th August, 1860, was effected at Liverpool for 2400*l.* on the plaintiff's ship "Hero," valued at 3200*l.*, and was underwritten by the defendant for 125*l.* The loss of the ship having been proved, the defendant gave in evidence three other policies effected by the plaintiff on the same ship for the same voyage, viz., a policy effected at Bristol, dated the 30th July, 1860, for 725*l.*, in which the ship was valued at 3000*l.*; another effected at Aberdeen, dated the 8th May, 1861, for 500*l.*, in which the ship was valued at 3000*l.*; and another effected in London, dated the 20th June, 1861, for 3450*l.*, in which the ship was valued at 5000*l.* There was conflicting evidence as to the real value of the ship. The plaintiff had received from the underwriters of the Bristol policy 49*l.* 6*s.* 6*d.*, from the underwriters of the Aberdeen policy 68*l.* 7*s.*, and from the underwriters of the London policy 1950*l.*, amounting in the whole to 3126*l.* 13*s.* 6*d.*

The learned Judge, in leaving the question of damage to the jury, told them that insurance was a contract of indemnity, and that, for the purpose of the present action and as between the plaintiff and defendant, the value agreed upon and stated in the policy must be taken as *771] the real value of the ship, *viz., 3200*l.*; and that, as the plaintiff was entitled to recover in respect of a total loss, he was entitled to be indemnified to that amount; but that the sums which the plaintiff had received on the three other policies, amounting to 3126*l.* 13*s.* 6*d.*, must be deducted from the agreed value; so that there would only be due on the policy on which this action was brought 73*l.* 6*s.* 6*d.*, of which the defendant's proportion as one of the underwriters was 3*l.* 16*s.*, which was all that the plaintiff was entitled to recover against him: that the fact that the ship had been valued at a larger sum in another policy ought not to be taken into consideration. The jury found a verdict for the plaintiff for 3*l.* 16*s.*

Brett, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection as to the measure of damages; against which

Edward James (with whom was *Milward*) showed cause (Jan 23).—The direction of the learned Judge was correct. The plaintiff is only entitled to recover from the defendant the balance of the amount insured, after giving credit for the sums already received by the plaintiff under the other policies. Insurance is a contract of indem-

nity: if there be an open policy, the assured is entitled to recover the value of the ship; but where there is a valued policy, the sum stated in it is the agreed value as between the parties, and the assured cannot recover more. In *Bousfield v. Barnes*, 4 Camp. 228, the plaintiff had effected two policies; one for 600*l.*, valued at 6000*l.*; and the other for 6000*l.*, valued at 8000*l.* The ship having been wrecked the underwriters paid him the 6000*l.*, and he then sued upon the other policy. Evidence was adduced that the ship was worth more than 8000*l.*, and on that ground it was held that he was entitled to recover. Lord Ellenborough there said:—"I will take care that the *assured do not recover upon the whole more than the real value of the [772 subject-matter insured. But I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity." Where a person effects two policies of insurance in each of which the same value is declared, he is bound by that sum: *Irving v. Richardson*, 1 Moo. & R. 158; *Morgan v. Price*, 4 Exch. 615.† [WILDE, B.—Insurance is a contract of indemnity as respects the true value; and therefore, to the extent to which the assured has been damaged, he is entitled to recover. But where the policy is valued the assured is estopped from saying that he has sustained damage to a greater extent than the agreed value.] In *Park on Insurance*, vol. 2, p. 600, 8th ed., it is said:—"Where a man has made a double insurance, he may recover his loss against which of the underwriters he pleases, but he can recover for no more than the amount of his loss." In *Lewis v. Rucker*, 2 Burr. 1167, 1171, Lord Mansfield, C. J., said:—"The only effect of the valuation is *fixing the amount of the prime cost*; just as if the parties admitted it at trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in *such a manner* as that the insured meant only to have an indemnity."

Brett and Quain, in support of the rule.—It is not contended that an underwriter is liable to pay more than the agreed value of the ship as between him and the assured; but he is not entitled to any deduction in respect of sums received by the assured on other policies. The sum stated in each policy is not the actual but the agreed value of the *ship. It is well known that the value of a ship varies according to the demand for shipping. It depends on the state of [773 trade, not on the cost of the ship. A ship may be undervalued at one time and overvalued at another, and therefore to avoid all dispute the parties agree to a value by which they shall be bound. Here the plaintiff, having sustained a total loss, is *prima facie* entitled to recover the agreed value. The defendant admits the loss but gives in evidence policies between the plaintiff and other underwriters for the purpose of showing that he has been paid. But those documents being in evidence must be taken for all purposes. For instance, the London policy being given in evidence for the purpose of showing a payment under it of 1950*l.*, it must be taken that at the time that policy was effected the ship was of the value stated in it, viz., 5000*l.*, and therefore only two-fifths of its value has been paid under that policy. Again, under the Bristol policy 492*l.* has been paid, which is only one-sixth of the agreed value; and under the Aberdeen policy

684*l.* has been paid, which is only seven thirty-seconds of the agreed value. This mode of calculation shows a much larger sum due to the plaintiff on the present policy than was found by the jury. In Arnould on Insurance, vol. 1, p. 346, 2d ed., it is said that the rule established by Lord Mansfield is as follows:—"In case of over-insurance the different sets of policies are considered as making but one insurance, and are good to the extent of the value of the effects put in risk; the assured can recover on the different policies no more than their value, but he may sue the underwriters on either of the policies, and recover from those he so sues to the full extent of his loss, supposing it to be covered by the policy on which he elects to sue, leaving the underwriters on that policy to recover a rateable sum, by way of contribution, from the underwriters on the *other policy." Reference is there made to *Newby v. Reed*, 1 W. Black. 416, which was a case of open policies, and the question is whether the same rule applies to valued policies in each of which a different value is stated. If the rule contended for by the defendant is to prevail, this strange consequence will follow, that supposing the plaintiff sued on all the policies except the London one, and recovered their full amount, he would receive upon those policies 3625*l.*; and he might then sue upon the London policy and recover 1875*l.*, being the difference between 3625*l.* and 5000*l.*, the agreed value in the London policy. So that the amount which the plaintiff would be entitled to recover would depend upon which policy he first put in suit. The more rational rule is to take the average value of the four policies, by adding together the several agreed values in each and dividing it by four, which in this case would give 3600*l.* as the value of the ship.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. I think my brother Willes was quite right in his direction, and that it is fortified by authority and reason. The action is brought on a policy of insurance for 2400*l.* effected on a ship valued at 3200*l.* It appears that the ship was insured by other policies and that the assured has received on them 3126*l.* 18*s.* 6*d.*; and the question is whether he is entitled to recover more than the difference between that and 3200*l.*, viz., 73*l.* 6*s.* 6*d.* The plaintiff seeks to recover more, on the ground that the sums which he has received on the other policies ought not to be taken into consideration. The learned Judge who tried the cause did not adopt that view, and I think properly. He considered that, as between the plaintiff and defendant, the value of the vessel must be taken as 3200*l.*, *and it appears to me that is the correct view. It may happen that when a vessel is insured for a long time or a long voyage, her value may not be the same at the beginning as at the end of the voyage. More freight being carried might increase her value, or she might have met with an accident and have been so thoroughly repaired that her value might be considerably increased. But in general the value must be taken to be that which is stated in the policy. If that is binding upon the underwriter, so that he cannot give evidence of the real value of the vessel, and so prevent the assured from recovering the amount stated in the policy, the assured is equally bound by the agreed value, and if he has received that amount he has no further claim upon any other underwriter. If he has received less he can

only recover on other policies the difference. Upon these grounds I think that the rule ought to be discharged.

MARTIN, B.—I am of the same opinion. I admit that a judgment given in a matter of this kind is not altogether satisfactory, which arises from the circumstance that Courts of law view policies of insurance in one light, whilst the assured views them in a totally different light. Courts of law are obliged to discuss these questions on the principle that the sum to be recovered is an indemnity for the value of the ship, but persons who insure entertain an entirely different notion, so that we have to decide on principles at variance with those of the parties when they enter into these contracts. It is therefore scarcely possible that the decision of a Court of law can be satisfactory to them. If the practice between the shipowner and the underwriter were founded on the principle alluded to by Lord Mansfield in his judgment in *Lewis v. Rucker*, 2 Burr. 1167, 1171, viz., "that *the value is fixed in such a manner that the insured means [*776 only to have an indemnity," the matter would be plain. But that is not the mode in which shipowners and underwriters do business. I remember a case respecting a ship the owner of which, who was a witness, proved that he had effected a policy and valued the ship upon a principle which had no reference whatever to its real value. He had opened a debtor and creditor account between himself and the ship, and insured the ship for the balance owing to him. A lawyer would say that a shipowner had no right to insure on that principle, and that he ought to value the ship on the principle stated by Lord Mansfield, to which I have referred.

It seems to me in this case that the view taken by my brother Willes was in accordance with authority. He considered that, by the agreement between the assured and the underwriters, the value of the ship was to be taken at £2000, and that the plaintiff was entitled to recover that sum in respect of the loss of the ship. He then inquired what sum of money the assured had received, leaving out of consideration how he got it, and, finding that he had received \$1267 13s. 6d., he treated it as if there had been a salvage of the ship, and the assured had received that amount after the ship was sold. He then placed that amount to the credit of the underwriter as against the £2000; and he entirely dismissed from his consideration what was stated as the value of the ship in other policies between the plaintiff and individuals to whom the defendant was a stranger. According to the best judgment I can form on the matter, that is the more correct mode of estimating the damage. It is in accordance with the view taken by Courts of law, that insurance is a contract of indemnity against the loss actually sustained. I am not insensible to the *observa- [*777 tion that the amount which the assured is entitled to recover may depend upon which policy he first puts in suit; but, in point of fact, each policy is a separate contract, and the assured must deal with each underwriter according to his particular contract.

CHANNELL, B.—I am of the same opinion. The damages were assessed under the direction of the learned Judge; and an application is made for a new trial on the ground that he misdirected the jury in stating his view as to the measure of damage. The broad question is whether the plaintiff is entitled as against the defendant to damages

to a greater amount than he has recovered. If so, there would be ground for granting a new trial; but, being of opinion that the damages were rightly assessed, it is unnecessary to consider whether any other mode of assessment should be resorted to. The plaintiff has recovered from the defendant, not his proportion of the \$200l., the agreed value in the policy, but his proportion of the difference between that sum and the amount which the plaintiff received on the three other policies. I think that is all the plaintiff is entitled to; and that, when the defendant is sued for his proportion upon a policy in which the ship is valued at \$200l., that must be taken as the value of the ship for the purpose of his liability; and the question is how far that is lessened by the sums received on other policies. I agree that some inconvenience may result from the rule now laid down; and it is not satisfactory to find that, if the order of suing on the policies had been inverted, a different amount would have been recovered. But I think that is in a great degree attributable to the character of these insurances, as explained by my brother Martin; and that, at all events, as the *778] plaintiff has effected an insurance *in which his ship is valued at \$200l., we must abide by the rule of law that, for the purpose of estimating the liability of the defendant, that amount must be taken as fixed by the policy.

Rule discharged. ✓

BANCROFT v. GREENWOOD, HYDE, and CHADDERTON.

Jan. 30.

Where a writ of summons has issued against several defendants, who enter a joint appearance, and the plaintiff declares against some of them only, the others may, after notice to declare, sign judgment of non pros as against themselves.

IN this case the plaintiff issued a writ of summons against the three defendants, who were served with a copy of it; and on the 18th of October, 1862, they entered a joint appearance. On the 18th of December the plaintiff declared against the defendants Greenwood and Hyde, but not against the defendant Chadderton. On the 2d of January, 1863, Chadderton served the plaintiff with the usual notice to declare against him within four days. The plaintiff not having declared, on the 10th of January Chadderton signed judgment of non pros. A summons was taken out at Chambers to set aside the judgment for irregularity, which was heard before Channell, B., who dismissed it with costs.

C. Hutton now moved to set aside the notice to declare and judgment for irregularity.—Judgment has been signed by a person who is a stranger to the record. [WILDE, B.—How is he to get his costs?] By application to a Judge under the 8 Eliz. c. 2, s. 2. A judgment of non pros differs from a nolle prosequi, which is merely a partial forbearance by the plaintiff to proceed any further either as to some of the defendants, or to part of the suit; but by a non pros the plaintiff is put out of Court against all the defendants: 1 Wms. Saund. *779] 207 d. note; *Philpot v. Muller*, 1 Doug. 169, note. In **Powell v. White*, 1 Doug. 169, it was held that in a joint action against

several, the plaintiff cannot be non-prossed unless by all the defendants. [CHANNELL, B.—There the writ was against three persons, one was arrested and put in bail, but the two other defendants did not appear. In Chitty's Archbold's Practice, p. 1466, 11th ed., it is said:—"If the action be against *several* defendants, the plaintiff may be non-prossed by any one on behalf of all, if all have appeared, and he is in default as to all, and he has their authority for signing the judgment." MARTIN, B.—In *Hamlet v. Bingham*, 5 Scott N. R. 889, 4 M. & G. 909, nom. *Hamlet v. Breedon*, both Tindal, C. J., and Maule, J., said that where the plaintiff does not declare against one of several defendants, the proper course is for him to sign judgment of non pros as against himself.] In that case the plaintiff had not declared against any of the defendants. Where a plaintiff has elected to declare against one of several defendants only, it is the same as if the names of the others were struck out of the writ: *Davies v. Thomson*, 14 M. & W. 161.† [MARTIN, B.—In Tidd's Practice, vol. 1, p. 459, 9th ed., the law is thus stated:—"In a joint action, it is said the plaintiff cannot be *non-prossed* by one or more of the defendants, without the others. And this is universally true in actions by *original*, where the plaintiff cannot proceed against the defendants severally, upon a joint writ. But upon common process for a supposed trespass, in the King's Bench or Common Pleas, if the plaintiff declare, serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of non pros." That refers to the old proceeding by bill of Middlesex or writ of latitat, which was not the commencement of the action, but only a process to bring a defendant into Court. *Roe v. Cock*, 2 T. R. 257, was the foundation of [*780 the practice, and at that time a plaintiff might join several persons in one writ, though the causes of action against them were different, and afterwards declare against each separately, upon which they became separate actions. But now, by the Common Law Procedure Act, 1852, sect. 4, "every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one." In *Butler v. Upton*, 2 T. R. 258, note, four defendants were joined in the writ, and one signed judgment of non pros; but it appearing that the plaintiff had taken out a rule for time to declare against the one only, that was considered a sufficient indication of the plaintiff's intention to declare severally. Here, the plaintiff having already declared against two defendants, a declaration against the third would be irregular: *Pepper v. Whalley*, 1 Bing. N. C. 71 (E. C. L. R. vol. 27). The 8 & 9 Wm. 3, c. 11, s. 1, was the first statute which gave costs to one of several defendants, but that does not apply to a judgment of non pros; and the 23 Car. 2, stat. 2, c. 2, only extends to a judgment of non pros as against all the defendants. The 3 & 4 Wm. 4, c. 42, s. 32, gives costs on a nolle prosequi against one of several defendants, thus carrying out the distinction contended for between a judgment of non pros and a nolle prosequi.

POLLOCK, C. B.—There ought to be no rule. This is not a question of principle, but purely of practice. There has been an inveterate practice for a great number of years, and it is now proposed that we

should review the decisions on the subject from a very early period, and alter the practice. It appears to me that we are bound by the practice, and not called upon to alter it by any of the reasons *781] suggested. Moreover, we have the satisfaction of knowing that the practice is not only in conformity with the law, but also in accordance with good sense and justice.

MARTIN, B.—I am of the same opinion. If this were a matter *de novo*, I should have thought that nothing could be more just and reasonable than, if a plaintiff thinks fit to sue three defendants jointly, and afterwards elects to declare against two only, the third should be enabled to get rid of the action by signing judgment of non pros. But the practice is not new. I do not propose to go further back than the year 1788, when there was a case of *Roe v. Cock*, 2 T. R. 257, in which this matter was considered, and Ashurst, J., said:—"It is true, as has been suggested, that a plaintiff may join four defendants in a writ, and afterwards declare against all, or only one, as he pleases. In *Powell v. White*, 1 Doug. 169, the plaintiff had not declared; but when the plaintiff has proceeded thus far against one defendant only, it becomes a separate action, and it would be absurd to say that neither of the three other defendants could sign a judgment of non pros." I find the practice so stated in Tidd's Practice, vol. 1, p. 459, 9th ed., and it is distinctly laid down in the Court of Common Pleas by Tindal, C. J., and Maule, J., in *Hamlet v. Bingham*, 5 Scott N. R. 889; 4 Man. & G. 909. I also find it adopted in the books on practice in common and ordinary use. I am content to act upon the judgments of Tindal, C. J., and Maule, J., without inquiring how or why the practice was introduced. But Mr. Hutton says that *Roe v. Cock* was the foundation of the practice, and that at that time it was competent to a plaintiff to deliver several declarations upon a single writ. If that be so, he is probably right; but when we find a positive rule of *782] practice laid down and acted upon for a series of years, why should we depart from it, or stop to investigate the reason of its adoption? It seems to me that the practice is just and reasonable, and ought to be adhered to.

CHANNELL, B., and WILDE, B., concurred.

Rule refused.

THE ATTORNEY-GENERAL *v.* BRACKENBURY and Another.
Jan. 27.

In the absence of a contrary intention apparent on the face of a will, a general residuary bequest operates as an exercise of a general power of appointment, of which the testator is the donee, although the residuary legatees are the persons who would be entitled, in default of appointment, under the instrument creating the power.

If in such case the testator has in the first instance charged his residuary estate with the payment of debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment, and elect to take under the gift to them in the original instrument.

Quære, whether the disclaimer by an appointee operates to vest the fund appointed in the persons entitled in default of appointment?

A. by will bequeathed his residuary personal estate, on the death of his daughter B., unmarried, to trustees, for such purposes as she should by will appoint, and in default of appointment in trust for his brother C. and his sister D. B. died unmarried, having bequeathed her residuary estate (subject to the payment of debts, funeral and testamentary expenses, legacies and annui-

tise) to her uncle C. and her aunt D. :—Held, that B.'s will operated as an exercise of her power of appointment, and that C. and D. were liable to pay duty on the fund appointed at the rate of 5 per cent. and not 3 per cent., the rate at which they would have been liable if they could have taken directly under A.'s will.

INFORMATION in equity by the Attorney-General, as follows :—

1. The object of this information is to obtain from the defendants, who are the acting executors of the will of Harriette Mary Brackenbury, deceased, payment of the legacy duty in respect of certain property, which under the will of her father, James Blackledge Brackenbury, deceased, and in the event (which happened) of her death without having been married, she had power to dispose of as she might think fit, and which she did in fact dispose of by her will.

2. The said James Blackledge Brackenbury by his will, dated the 5th day of June, 1843, appointed his brother the defendant Ralph Brackenbury and his sister Hannah *Brackenbury, and his brother-in-law John Hobson, to be executors and trustees for [*788 the purposes thereafter mentioned. And after making certain pecuniary and specific bequests he devised all his real estates unto his said trustees upon trust to sell the same, and he directed that the money to arise by sale thereof should form part of the residue of his personal estate, and he also bequeathed to his trustees all his personal estate not thereinbefore disposed of, and authorized them to convert the same into money; and he directed his trustees to invest the net proceeds of the moneys arising from the sale of his real estates, and from the conversion of his personal estate, in manner in his said will mentioned, and to stand possessed thereof and of the securities for the same upon certain trusts which, so far as it is necessary for the purposes of this suit to state the same, were in effect as follows, that is to say, upon trust to pay the net income thereof to his daughter the said Harriette Mary Brackenbury during her life, but so that in case of her marriage the same should be for her separate use. And after her decease in trust, as to the capital thereof, for her children or other issue as she should by deed or will appoint, and in default of appointment for such of her children as should attain the age of twenty-one years or marry under that age, and if more than one in equal shares. And in case (which happened) his daughter should not marry, then after her decease the said trust funds and the annual income thereof were to remain and be upon and for such trusts, intents, and purposes as his said daughter by her will should direct or appoint; and in default of such direction or appointment, or so far as any such, if incomplete, should not extend, in trust, for his said brother and sister, their executors, administrators, and assigns in equal shares.

3. The testator afterwards died without revoking or altering his said will, which was on the 4th of December, 1844, *duly [*784 proved in the Prerogative Court of the Archbishop of Canterbury.

4. The testator's daughter Harriette Mary Brackenbury survived him, and by her will, dated the 23d of July, 1859, gave various pecuniary legacies and annuities. And after and subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities thereinbefore given, she gave all the residue of her property, both real and personal, unto and equally between her uncle the

defendant, Ralph Brackenbury, and her aunt, the said Hannah Brackenbury, their heirs, executors, administrators, and assigns. And she appointed the defendants Ralph Brackenbury and Edward Lewis, and also Thomas Tomlinson (who renounced probate), executors of her will.

5. The said Harriette Mary Brackenbury afterwards died without having ever been married, and without revoking or altering her said will, which was, on the 20th of June, 1861, duly proved by the defendants, Ralph Brackenbury and Edward Lewis, in the principal registry of her Majesty's Court of Probate.

6. The will of the said Harriette Mary Brackenbury operated as an exercise of the general power of appointment to which, in the event, which happened, of her death without having been married, she became entitled, under her father's will, over the whole of his residuary estate. And thereupon legacy duty under his will, at the rate of 1*l.* per cent., became payable in respect of the said residuary estate as if the same had been immediately given to her by such will, and was accordingly duly paid by the defendants as her executors, an allowance being made to them on account of the duty previously paid in respect of her life interest therein. And it is contended by the Attorney-General, but not admitted by the defendants, that legacy duty *785] after the rate of 5*l.* per cent. is now *payable under the will of the said Harriette Mary Brackenbury in respect of so much of the testator's residuary estate as was, by the will of the said Harriette Mary Brackenbury, appointed and disposed of in favour of her uncle, the defendant, Ralph Brackenbury, and her aunt, the said Hannah Brackenbury, under the residuary gift contained in her said will as hereinbefore stated. The question for the decision of the Court is, whether or not duty at that, or any other, and what rate, is payable in respect of the premises.

The bill prayed a declaration (inter alia) that legacy duty was payable at the rate of 5*l.* per cent. in respect of so much of the residuary estate of the testator, James Blackledge Brackenbury, as was appointed by the will of his daughter, in favour of her uncle, the defendant, Ralph Brackenbury, and her aunt, Hannah Brackenbury.

The answer of the defendants (so far as is material) was as follows:—

1. We submit to the judgment of the Court as questions of law, and not of fact, whether or no, as alleged in the said information, the property therein referred to, and in respect of which payment of legacy duty is claimed, is property which Harriette Mary Brackenbury, deceased, did in fact dispose of by her will, and whether her will did or did not operate as an exercise of the general power of appointment, to which, in the event, which happened, of her death without being married, she became entitled, under her father's will, over the whole of his residuary estate, or whether thereupon legacy duty under his will, at the rate of 1*l.* per cent., became payable in respect of the said residuary estate, as if the same had been immediately given to her by such will; and we say that, although true it is that we, as her executors, and in order to avoid proceedings on the part of her Majesty's Attorney-General against us, consented to pay,

and did in fact pay, duty at the rate last *aforesaid on the amount of the said property, such payment being, as we submit, a payment in our own wrong, cannot prejudicially affect us in respect to the claim now sought to be enforced against us. [*786]

2. With the exceptions above referred to, the statements contained in the first six paragraphs of the said information are, we believe, correct.

3. We do decline to pay legacy duty at the rate of 5*l.* per cent. in respect of so much of the testator's residuary estate as, in the events which have occurred, has, under his will, become the property of his daughter's uncle and aunt (and which, in the said information, is described as having, by the will of the said testator's daughter, been given to her said uncle and aunt). We decline to pay duty at that rate upon the ground that, in the events which have occurred, no duty at that rate is payable; but we have repeatedly offered, and are willing, to pay duty at the rate of 3*l.* per cent. in respect of the said property.

The Attorney-General, The Solicitor-General, Locke and Hanson, for the Crown.—The question for discussion is, whether the rate of duty payable to the Crown is 3*l.* or 5*l.* per cent. If the will of the donee of the power operates as an execution of her power, and the appointees, who are the uncle and aunt of the testatrix and may be treated as real defendants, (a) take under the power, duty is payable at the rate of 5 per cent. If, on the other hand, the appointees, who are the brother and sister of the donor of the power, and who under the will creating the power would take in default of [*787] appointment, can do so here, duty will, in that event, be payable at the rate of 3*l.* per cent. only. Two points are made by the defendants: first, that the general devise does not operate as an execution of the power of appointment: secondly, assuming that it does, the defendants are entitled to reject the appointment, and disclaim taking under it, so as to enable them to take under the bequest to them in default of appointment. To the first point a conclusive answer is given by the language of the 1 Vict. c. 26, s. 27, (b) which is express, that a general bequest of personal estate shall include any personal estate, which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. Here there is

(a) It was stated, in the course of the argument, that it had been arranged between the Crown and the defendants, as representing the residuary legatees, that the case should, with the permission of the Court, be argued without reference to any question as to the fitness of the parties, defendants on the record, or as to whether the time at which the duty became payable had arrived, but solely with reference to what the rate of duty was, which was payable. See the judgment of Channell, B.

(b) Sect. 27 enacts:—"That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

no indication of any such intention. As to the second point, undoubtedly the appointees might reject the property altogether. That, however, is not their object. Their object is, by rejecting their better title, to take under an alternative title, which could only *788] exist if their better title had no existence. A person *in possession by virtue of a worse title when his better title accrues has, by the common law, no power of election, but is remitted to his better title. The argument, that the appointees can elect to take in default of appointment, when there has been a valid appointment in their favour, involves a contradiction of language. This, however, is no abstract question, but depends upon the intention expressed by the legislature in the Acts which impose the duty. The 55 Geo. 3, c. 184, is the statute which regulates the rate of duty, but the 8th section of that Act incorporates the provisions of previous enactments. The provisions of 36 Geo. 3, c. 52, applicable to this case, which do not relate to the amount of duty, remain in force. The 7th(a) and 18th(b) sections of that Act are in *pari materia*, and must be read together. The language of the 18th section is express, that it is *the execution of the power*, not the acceptance by the appointee, which renders the property, for the purpose of taxation, the property of the donee of the power and chargeable as such with duty, upon the principle that the donee has exercised absolute dominion over it. It follows that, under the 7th section, the property must be treated, for the purpose of taxation, as derived from the *789] *estate of the donee, and not as a gift, which, if the appointees disclaim, they can take under their earlier title. It is true the donee cannot herself have the full enjoyment of the property on which the power operates, since she can only exercise it by will. It is, however, concluded by authority that such a power is a general power within the meaning of the 7th and 18th sections: *Platt v. Routh*, 6 M. & W. 756.† There, upon a case stated by order of the Master of the Rolls, it was held by this Court, that a power which could only be exercised by will, and from the benefit of which certain individuals were excluded, was a power to dispose of as he or she shall think fit, within section 7, and a general and absolute power within section 18. The Master of the Rolls confirmed the certificate of this Court: *Platt v. Routh*, 3 Beav. 257; and, upon appeal, the House of Lords affirmed his judgment: *Drake v. The Attorney-General*, 10 Cl. & F. 257. That case is also an authority that, by the execution of the power in the present case, the executors of the donee were made liable to the additional duty, and have not paid it in their own wrong. There, too, the fund was appointed to persons entitled in default of appointment, but no point of election was ever raised.

(a) Sect. 7 enacts:—"That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act," &c.

(b) Sect. 18 enacts:—" . . . and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, *such property, upon the execution of such power, shall be charged with the same duty, and in the same manner as if the same property had been immediately given to the person or persons having and exercising such power, after allowing any duty before paid in respect thereof,*" &c.

Again, it is a settled principle of law that every appointment under a general power makes the property upon which it operates assets for the payment of debts: *Lord Townshend v. Windham*, 2 Ves. 1, *Platt v. Routh*, 6 M. & W. 789.† By the terms of this will the fund appointed is expressly charged with the payment of debts, funeral and testamentary expenses, legacies and annuities, and the residue of the fund, after these charges have been paid, is blended in one mass with the residuary estate of the testatrix. Can the ultimate appointees elect to disclaim, *so as to prejudice these charges? Can they [*790 separate and reject the portion of the residuary estate which comes to them by appointment while they accept and retain the other portion? Further, the creation of charges, which the executors must satisfy, and the blending of the residue of the fund with the general residue, show, by implication, that this fund, like the general residue, must vest in the executors. If so, it is clear, on the authorities, that if, by lapse or otherwise, the appointment fails, the fund would not go as in default of appointment, but to the next of kin of the testatrix: *The Attorney-General v. Staff*, 2 Cr. & M. 124,† *Goodere v. Lloyd*, 3 Sim. 538, *Chamberlain v. Hutchinson*, 22 Beav. 444. The principles of construction applicable to the will which creates and the will which executes the power, the sections of the Acts cited, and the general principle which renders the exercise of a general power of appointment necessarily operative to make the property assets for the payment of the appointor's debts, all concur to exclude the notion that the appointees can elect, by a disclaimer, to take in default of appointment.

Mellish and Dart, for the defendants.—To constitute a *complete* appointment there must be, first, a sufficient exercise of the power; secondly, a person competent and willing to take under the appointment. There is no such complete appointment here. The exercise of the power fails to carry out the intention with which the donor created it, viz., to enable the donee to appoint to persons other than those who would take in default of appointment.

But first, this general devise would, prior to the passing of the 1 Vict. c. 26, s. 27, have been no execution of the power, and this, it is submitted, is not a case to which the *27th section of that Act [*791 was intended to apply. The object which the legislature had in view was to effectuate the presumed intention of testators to include in a general devise property over which they had a power of appointment. Such an intention can only be presumed where the general bequest is in favour of persons *other than* those who would take in default of appointment, or where, although the same persons, they would take in a different manner. Thus, in *Platt v. Routh*, 6 M. & W. 756,† even assuming that the same persons who there took the 10,000*l.* consols as appointees would also have taken in default of appointment, they would have taken in a different manner. Under the appointment they would take as tenants in common; in default of appointment as joint tenants, there being no words of severance.

Secondly, the defendants were entitled to repudiate the gift under the power, and elect to take in default of appointment. It must, however, be conceded, on the part of the defendants, that no disclaimer by them could in any way affect the charges, which, if not paid out

of the residuary estate of the testatrix,^(a) would, no doubt, have to be satisfied out of this fund. [MARTIN, B.—That admission appears to me conclusive against the defendants. POLLOCK, C. B.—It is not competent for the appointees to take under the will in part and reject in part.] If apt words had been used, the will of the testatrix might have been so framed as to execute the power of appointment for the *792] purpose of securing the debts and other charges, *and to leave it unexecuted as to the residue. [WILDE, B.—That would be exercising dominion, not over a specific part of the property, but over the whole.] Only to the extent that might be necessary for the purpose of satisfying the charges. The language of the 36 Geo. 3, c. 52, ss. 6, 7, and the 55 Geo. 3, c. 184, sched. part 3, tit. *Legacies* (by which the rate of duty is fixed), show that no legacy duty is payable until after the legacy shall have been paid and satisfied. It follows that if the legatees disclaim, no duty ever becomes payable. The Crown has relied on the fact, that, under the 36 Geo. 3, c. 52, s. 18, an additional duty became payable by the donee of the power, upon the execution of the power. It is clear, however, that such duty is payable in respect of the devise to the donee of the power, and would be equally payable if her estate were insolvent; while legacy duty on her will would only be payable in respect of the sums which the legatees took under it. The cases cited to show that the property would, in the event of a disclaimer, go to the next of kin are obviously distinguishable. The power was in each case exercised in favour of the executors, and that was followed by a distinct bequest of the rest of the property; whereas here the general devise is, as regards the residue, the only execution of the power of appointment. In *Chamberlain v. Hutchinson*, 22 Beav. 444, which more nearly resembles the present case, the testatrix, having a general power of appointment over a fund, first appointed it to her executor and charged it with debts and legacies, and then after blending it with her residuary estate bequeathed a moiety of the whole to the person entitled, in default of appointment, to a moiety of the appointed fund. Thus she executed the power to make the estate her own, and then proceeded to bequeath *793] it, not for the purpose of executing the power, but *as part of her personal estate. The bequest having lapsed, the Master of the Rolls thought the appointor had shown her intention to make the fund a part of her personal estate, and that therefore the next of kin were entitled. The *Attorney-General v. Staff*, 2 Cr. & M. 124,† and *Goodere v. Lloyd*, 3 Sim. 538, are distinguishable on similar grounds. So far as *The Attorney-General v. Staff* was a decision that the property appointed to the executors became liable to probate duty, it was overruled by the subsequent case of *Platt v. Routh*, 6 M. & W. 756.† [WILDE, B.—Is there any authority to show that if one or more appointees reject the benefit of an appointment, that circumstance brings into operation the bequest in default of appointment?] No case has been found in which the benefit of an appointment has been rejected. On principle, however, it is contended that if real or

(a) It was stated in the course of the argument, that, independently of her power of appointment, Miss Brackenbury died in the absolute possession of a large personal estate, which was amply sufficient to satisfy the debts and charges upon her residuary estate. The Court however intimated that they could not take notice of this fact unless it was formally raised on the record.

personal estate be devised upon trust for such persons as A. shall appoint, and in default of appointment to B.; if A. appoints to a person, who disclaims, the estate will not go to the executors or next of kin of the person who executed the power, but it will go to B. as in default of appointment. The words "default of appointment" must mean default of an appointment under which the appointee takes. If so, the appointment would operate to secure the charges, but no further. Here, if the appointees had predeceased the donee of the power, could it be doubted that effect would be given to the gift in default of appointment? Again, if the donee had annexed an onerous condition to the enjoyment under the power, could not the appointees have disclaimed? But if the right to elect exist at all, it must be independent of the reason for which it is exercised. In the case of *Re Barker*, 7 H. & N. 109,† Pollock, C. B., said that the Crown must show itself entitled in substance and technicality. In *substance, beyond doubt, this gift has its origin in the bounty of [794 the donor of the power.

The Attorney-General was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the executors of the will of the testatrix are bound to pay legacy duty at the rate of 5 per cent. The testatrix, by the mode in which she framed her will, appointed and exercised dominion over the fund subject to her power of appointment, by making it liable to her debts, and to legacies and annuities. When Mr. *Mellish* was compelled to admit, that as to the debts, legacies, and annuities, there was a valid exercise of the power, there was, as my brother Martin remarked at the time, virtually an end of the case. The uncle and aunt of the testatrix, if they take the property, must take it by virtue of her will, and are therefore liable to a duty at the rate of 5 per cent.

MARTIN, B.—I am of the same opinion. It is not necessary to say what my judgment might be in a case where, within a reasonable time after the death of the donee of a power, the appointees disclaimed all benefit accruing to them under the will which executed the power, and elected and declared their election to take under the gift in the will by which the power was created. That is not the case with which we have to deal. Upon the true construction of the statements in this information and answer, I think we ought to assume that the defendants, and the persons beneficially entitled whom they represent, were either entirely silent in the matter, or, if not, that they did consent to take under the will of the testatrix.

Now the facts are these—Mr. James Brackenbury by his *will [795 bequeathed to his daughter an estate for life in this property, and he further provided that, after her decease, it should remain and be upon and for such trusts, intents, and purposes, as his said daughter by her will should direct and appoint, and in default of such direction or appointment, or so far as any such, if incomplete, should not extend, in trust for his said brother and sister, their executors, administrators, and assigns. In point of fact the testator's daughter did deal with this property, and declared it to be liable to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities given by her will, and that, subject thereto, it should be equally divided between her uncle Mr. Ralph Brackenbury, and her aunt

Miss Hannah Brackenbury. It would seem to follow from the case of *Chamberlain v. Hutchinson*, 22 Beav. 444, that the testatrix, by electing to exercise her power so as to charge the property with her debts, funeral and testamentary expenses, legacies and annuities, thereby took it to herself, and treated it as, and made it part of her personal estate; and that, in the event of a disclaimer, the next of kin, and not Mr. Ralph Brackenbury and Miss Hannah Brackenbury (assuming that they are different persons from the next of kin), would be entitled to the residue of the property. When Mr. *Mellish* admitted that to this extent there was a valid appointment, the case was at an end; because, when that admission is made, we are bound to assume that the appointees take under the will of the donee of the power. They must therefore pay the duty according to their relationship to her, and not to the original testator.

CHANNELL, B.—Mr. *Mellish* has argued that, upon the construction of the statutes which have been referred to, no duty whatever is payable at this time. Upon that point, I *express no opinion, *796] because I consider that the question upon which the parties have come here to obtain the opinion of the Court is, whether, assuming the event to have happened which entitles the Crown to some duty, that duty should be payable at the rate of 3 or 5 per cent. I am of opinion that the Crown is entitled to duty at the rate of 5 per cent.

The defendants are in my judgment liable to that duty, if the uncle and aunt take under the will of their niece; and they do so take, unless they are entitled to disclaim the gift under the appointment, and elect and have elected to take it under their brother's will. As soon as Mr. *Mellish* admitted, what is really indisputable, that the will of the niece operated not merely upon that portion of the property which she derived from her father's will, but upon the whole property to this extent, that at least there was a valid appointment so far as to give effect to that portion of her will which made debts, legacies, and annuities chargeable upon her estate, the uncle and aunt were precluded from saying they could take under the bequest in their favour in the original will, and that they do not take under her will. The case of *Chamberlain v. Hutchinson*, 22 Beav. 444, is an authority, which is here almost decisive. The distinction no doubt exists, which Mr. *Mellish* has pointed out, that the power was in that case exercised by the donee in favour of her executors in express terms; but that distinction would not prevent the application of the case as an authority, it would only remove one of the grounds of its application. Upon the whole, I am clearly of opinion that the Crown is entitled to duty at the rate of 5 per cent.

WILDE, B.—I am of the same opinion. The testatrix in this case *797] has executed a valid appointment in favour of *creditors and others, with a direction of the residue to her uncle and aunt. It is nevertheless contended that the uncle and aunt, by refusing to take the benefit of the appointment, can bring into operation the bequest, which the original will created in their favour in default of appointment. No authority has been cited for the proposition, that the rejection by one or more of the appointees of the benefit of an appointment, is equivalent to a default of appointment; and it would to my mind be strange if it could be so. The appointment is a valid

appointment; it is the exercise of a power, by which the testatrix has successfully assumed to herself the entire dominion over the fund. From this dominion two consequences inevitably follow: first, her executors become liable to the additional duty, under the 18th section; secondly, the fund becomes assets available for her creditors. It appears to me so violently inconsistent with this state of things, to hold that there has been a default of appointment, that the proposition requires no further refutation. Judgment for the Crown.

NEWALL v. ELLIOT and Another. Jan. 29.

Proceedings in Chancery for the infringement of a patent, the validity of which was in question, were referred to an arbitrator, who awarded that the patent was not illegal and void:—Held, that in an action between the same parties for another infringement, the defendant was not estopped from disputing the validity of the patent.

DECLARATION for the infringement of a patent for improvements in the apparatus employed in laying down submarine electric telegraph cables.

Pleas (inter alia).—Third: that the plaintiff was not the first and true inventor of the said invention.

Fourth.—That the plaintiff did not, within six calendar *months after the date of the alleged letters patent, cause to [*798 be filed a sufficient specification.

Fifth.—That the invention in the specification described was not the invention for which the letters patent were granted.

Sixth.—That the supposed invention was not new as to the public use and service thereof.

Seventh.—That the invention was not an invention for the sale, working, or making of any manner of manufacture for which letters patent could be granted according to the statutes in that case made and provided.

Replication to third plea.—That, before the commencement of this suit, the plaintiff filed a bill in Chancery against the defendants, complaining that the defendants had infringed the patent right in the declaration mentioned, being another and a different infringement from that in the declaration mentioned, and praying the said Court to grant an injunction against the defendants restraining them from infringing the said patent right; and thereupon, by an agreement in writing between the plaintiff and the defendants, it was agreed to refer the matter to an arbitrator.—(The replication set out the agreement, by which, after reciting that the plaintiff charged the defendants with infringing his patent; that the defendants denied the validity of the patent, and that the parties had agreed to refer the whole matter to arbitration; it was agreed that, in case the arbitrator should be of opinion that there had been an infringement of the patent by the defendants, he should give the plaintiff such compensation as he thought should be paid for the articles in use; and it was further agreed that the arbitrator should, if necessary, state a special case for the opinion of one of the superior Courts.)—And thereupon the

arbitrator took upon himself the said reference, and the plaintiff and defendant attended and appeared before him; and the defendant, *799] *amongst other things, contended before the said arbitrator that the plaintiff was not the first and true inventor of the said invention, and that the said letters patent were illegal and void on that ground. And thereupon the said arbitrator made and published his award in writing of and concerning the premises, and thereby awarded and decided that the said letters patent were not illegal and void; and in further pursuance of the said agreement of reference, being required by the defendants, the said arbitrator stated a case for the opinion of the Court of Common Pleas on certain points of law, and the said points of law were adjudged and decided by the said Court of Common Pleas in favour of the plaintiff.

There were similar replications to the fourth, fifth, sixth, and seventh pleas, alleging that the defendants had contended before the arbitrator that the letters patent were illegal and void on the grounds stated in those pleas respectively.

There was also a further replication to all the above pleas, alleging that the defendants contended before the arbitrator that the letters patent were illegal and void, and that the arbitrator awarded that they were not illegal and void.

Demurrer to each of the replications, and joinder therein.

Cleasby (Bidder with him) argued in support of the demurrers (Jan. 21st).—There is no estoppel. Estoppels are by matter of record, by deed, or in pais. The subject-matter of these replications is not within either of those classes. An estoppel in pais can only arise from some act or conduct of the parties themselves, as in the case of landlord and tenant, drawer and acceptor of a bill of exchange, and not from the act of a third person. Here there is no deed. Then as to estoppel by record, the cases only go to this extent, that if issue be joined upon a particular fact, in a Court of record having competent jurisdiction, *800] and the *finding is recorded, the parties to that record are estopped from disputing it, whether the finding is by the verdict of a jury or the award of an arbitrator. Here, however, there is no record. The replications merely disclose matter arising inferentially from the award.—He was then stopped by the Court.

Quain (with whom was *G. Denman*), contra (Jan. 26th).—The replications show that the matter in dispute between the parties is *res judicata*. The finding of an arbitrator upon the same point, between the same parties, might be said to be an estoppel in pais, for it is a finding by a person appointed by the parties themselves. But, at all events, it is an estoppel by matter quasi of record. In *Smith's Leading Cases*, vol. 2, p. 674, it is said that "decrees of the High Court of Chancery, which, although a superior Court, seems not to be, at least upon its equity side, a Court of record (see *Co. Litt.* 260), stand, nevertheless, on the same level with the judgments of the three superior Courts of common law." Then, after enumerating as instances of estoppels quasi of record, judgments of the Courts ecclesiastical, and Courts of Admiralty, the sentence of a college visitor, and a court-martial, it is said (p. 682):—"Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many instances

been created by a private individual. This does not, however, seem to alter the principle; for, though no private individual can create a Court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own; unless, indeed, he introduce some term inconsistent with public policy. Thus, on the same ground on which a visitor's sentence is supported stands the case of the *trustees of a school dismissing the schoolmaster for misconduct: *Doe* [*801 *v. Haddon*, 3 Doug. 310 (E. C. L. R. vol. 26); see *Rex v. Darlington School Governor*, 6 Q. B. 682 (E. C. L. R. vol. 51); and the ordinary case of an arbitrator, whose forum is a domestic one constituted by the parties themselves, who are bound by its award."] [MARTIN, B.—Suppose one officer strikes another, and is tried by a court-martial and acquitted, surely that would not be an estoppel in an action for the assault? What is said in Smith's Leading Cases as to an award is no authority for saying that an award would be an estoppel in an action for another infringement of the same patent.] In *The General Steam Navigation Company v. Guillou*, 11 M. & W. 877,† it was assumed that a plea, in substance, that the cause of action has been already adjudicated upon, in a competent Court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question, would have been good by way of estoppel, if it had been formally pleaded. [MARTIN, B.—In Com. Dig., tit. *Estoppel* (E. 4), it is said, "So an estoppel ought to be certain to every intent: Co. Lit. 353 b. And therefore, if a thing be not directly and precisely alleged, it shall not be an estoppel; Co. Lit. 352 b." POLLOCK, C. B.—In *Plummer v. Woodburne*, 4 B. & C. 625 (E. C. L. R. vol. 10), a plea of a judgment recovered in a colonial Court for the same cause of action was held bad for not showing that the judgment was final and conclusive in the colony itself, so as to bar the plaintiff from another action here.] In *Lord Faversham v. Emerson*, 11 Exch. 385,† it was assumed that an award as to the boundaries of a manor would have been conclusive if it had been pleaded as an estoppel. [WILDE, B.—This action is not in respect of the same matter upon which the arbitrator made his award; *and it is only by inference that the award can be made a [*802 decision upon the points now in dispute.] In order to make the award an estoppel between the same parties, it is not necessary that the action should be for the same infringement in respect of which the award was made. This is like the ordinary case of an action for mesne profits, in which, to a plea of not possessed, the plaintiff replies by way of estoppel the judgment in ejectment. [MARTIN, B.—The reason is that the action for mesne profits is ancillary to the action of ejectment. Assuming that, in order to arrive at the conclusion which the arbitrator has come to in favour of the patent, it must necessarily be inferred that he decided the points now in dispute between the plaintiff and defendant, still that is not such a decision as to render the award an estoppel within the rule laid down in Com. Dig., tit. *Estoppel* (E. 4).] In *Boileau v. Rutlin*, 2 Exch. 665,† there are dicta in favour of the plaintiff. In *Doe v. Rosser*, 3 East 15, it was held that, although the award could not have the operation of conveying the land, yet it concluded the defendant from disputing the title of the

lessor in ejectment. So, here, the parties having agreed that the validity of the letters patent shall be determined by an arbitrator, have agreed, that his award shall be final. [MARTIN, B.—The passage in Co. Lit. 325 *b*, is precisely in point:—"Every estoppel, because it concludeth a man to acknowledge the truth, must be certain to every intent, and not to be taken by argument or inference."]

Quain then applied for leave to amend.

POLLOCK, C. B.—The Court will take time to consider whether they ought to act in violation of the general rule, and allow the defendant to amend after so long an argument. *Cur. adv. vult.*

*803] *POLLOCK, C. B., now said.—In this case we expressed an opinion, at the time of the argument, that there was no estoppel, and the only question was whether we ought to allow the plaintiff to amend. After consideration, we think that we ought not to allow an amendment, and there will therefore be judgment for the defendant.
Judgment for the defendant.

HARDMAN and Others v. BOOTH. Jan. 12.

The plaintiff, a manufacturer, called at the place of business of "Gandell & Co." for orders for goods. At that time the firm consisted of Thomas Gandell only, and the business was managed by Edward Gandell, a clerk. On inquiring for Messrs. Gandell, the plaintiff was directed to a counting-house where he saw Edward Gandell, who led the plaintiff to believe that he was one of the firm of Gandell & Co., and under that belief, at the request of Edward Gandell, the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to "Edward Gandell & Co." Edward Gandell, who, unknown to the plaintiff, carried on business with one Todd, pledged the goods with the defendant for advances *bonâ fide* made to Gandell & Todd, and the defendant afterwards sold the goods under a power of sale.—Held, that there was no contract of sale, inasmuch as the plaintiff believed that he was contracting with Gandell & Co., and not with Edward Gandell personally, and Gandell & Co. never authorised Edward Gandell to contract for them; consequently no property passed, and the defendant was liable in trover for the amount realized by the sale.

TROVER for twenty-two pieces of serge and eighty-two pieces of woollen linings of the plaintiffs.

Pleas.—First: Not guilty. Second: that the goods are not the plaintiffs'.—Issues thereon.

At the trial, before Martin, B., at the London Sittings after last Trinity Term, the following facts appeared.—The plaintiffs were worsted manufacturers at Rawtonstall, near Manchester, and they employed Messrs. Hughes and Keighley as their London agents. In May, 1862, one of the plaintiffs being in London, and having heard of a firm of Gandell & Co., in Joiners' Hall Buildings, Upper Thames Street, called, with Keighley, at those premises and inquired for Messrs. Gandell. At that time the firm, which had been established eighty or ninety years, and was well known, consisted only of Thomas Gandell, who was old and in bad health; and his son, who was his clerk, managed the business. The firm of Gandell & Co. was only known to the plaintiff and Keighley by reputation, and, on their inquiring for Messrs. Gandell, one of the workmen directed them to the counting-house, where they found Edward Gandell. Keighley said, "I believe you are a buyer of the class of goods Mr. Hardman is making," and introduced the plaintiff to him. After some

conversation, and when they were about to leave, Edward Gandell said, "We are government packers, but we have a shipping connection that we sometimes buy for, and I have no doubt we shall be able to do a little business together." On leaving, the plaintiff began to copy the name from the door-post, when Edward Gandell handed him a printed card, having on it: "Thomas Gandell & Co., Packers, Joiners' Hall Buildings, 79 Upper Thames Street." Keighley had two subsequent interviews with Edward Gandell, at the first of which he introduced him to one Todd. The goods in question were ordered by Edward Gandell, and sent at two different times in July. The first lot was sent to Joiners' Hall Buildings, and a receipt for it was given by one of Gandell & Co.'s men; the other lot was taken away in a cart of Gandell & Co., which Edward Gandell had offered to send for it. The plaintiff drew a bill of exchange for the first lot of goods on "Messrs. Thomas Gandell & Co."; but, at the request of Edward Gandell, the name was altered to "Edward." The invoice for both lots was headed:—"Messrs. Edward Gandell & Co., Joiners' Hall Buildings, Upper Thames Street, London. Bought of Hardman, Brothers, per William Hughes & Co." Edward Gandell carried on business in partnership with Todd, whom he introduced to Keighley, and who had an office in Size Lane. Neither the plaintiff nor Keighley knew of the firm of Gandell & Todd. The goods were pledged by Edward Gandell to the defendant, who was an auctioneer, with a power of sale, as a security *for 300*l.* *bonâ fide* advanced by the defendant to Gandell & Todd. Shortly afterwards Gandell & Todd became [*805 bankrupt; and the defendant, in pursuance of the power, sold the goods by auction for 344*l.*, and retained 300*l.* and paid over 44*l.* to the assignees.

It was submitted, on behalf of the defendant, that the action was not maintainable, inasmuch as there was a sale of the goods to Edward Gandell. The learned Judge nonsuited the plaintiffs, reserving leave to move to enter the verdict for them for 344*l.*

Ballantine, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that no property passed to Edward Gandell in consequence of his fraud, and therefore the defendant was liable for the value of the goods.

Hawkins now showed cause.—There was a sale of the goods to Edward Gandell. The dealing took place with him, and the invoice was made out in his name. No doubt, the plaintiffs supposed that they were dealing with Gandell & Co., but where a person represents himself as belonging to a particular firm, and a party, believing that, contracts with him, though he may be liable to an action for a false representation the contract is nevertheless valid. The plaintiffs might have sued Edward Gandell for the price of the goods. Fraud does not vitiate a contract as against a *bonâ fide* purchaser without notice. In *Stevenson v. Newnham*, 13 C. B. 285, 302 (E. C. L. R. vol. 76), Parke, B., said that the effect of fraud "is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance, the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it, though it is

*806] *voidable between the original parties. This was decided in the recent case of *White v. Garden*, 10 C. B. 919 (E. C. L. R. vol. 70)." *Kingsford v. Merry*, 1 H. & N. 503,† is no authority against the proposition contended for, because in that case there was no contract which could be disaffirmed. A vendor who seeks to avoid a contract for the sale of goods on the ground of fraud, must exercise his option before a transfer to a bona fide purchaser.—He also referred to *Milne v. Leilter*, 7 H. & N. 786.†

Giffard and Poland, in support of the rule.—No property in the goods ever passed from the plaintiffs. They only intended to sell to Gandell & Co. through their agent, Edward Gandell. At what period of time was there a contract between the parties? Never: for the one party did not mean to sell and the other did not mean to buy. There never were two consenting minds. It is not the case of a contract made by fraud, which the vendor had the option of rescinding, but the case of goods obtained by a trick without any property passing. *Kingsford v. Merry* is an authority in favour of the plaintiffs.

POLLOCK, C. B.—I am of opinion that the rule should be absolute. The first question is whether there was a contract. It is difficult to lay down any general rule by which, at all times and under all circumstances, it may be determined whether or no there is a contract voidable at the option of the party defrauded, but in this case I think it clear that there was no contract. Mr. *Hawkins* contended that there was a contract personally with Edward Gandell, the individual with whom the conversations took place. It is true that the words were uttered by and to him, but the plaintiffs supposed that they were dealing with Gandell & Co., the *packers, to whom they sent the
*807] goods; the fact being that Edward Gandell was not a member of that firm and had no authority to act as their agent. Therefore at no period of time were there two consenting minds to the same agreement. Then, what is the consequence? A person having no authority whatever over the goods sends them to the defendant, an auctioneer, who, supposing the goods belong to that person, bona fide advances money upon them, taking a power of sale; but that did not authorize him to sell another person's goods, and retain the proceeds to reimburse himself. I think that he is liable to the extent of the money realized by the sale, and that the rule should be absolute to enter the verdict for that amount.

MARTIN, B.—I am also of opinion that there was no contract. I cannot doubt that the plaintiffs believed that they were dealing with Gandell & Co., the packers. The cases cited are quite correct; and if Gandell & Co. had obtained the goods by means of fraud, the plaintiffs might have been precluded from recovering. But the case is very different. The goods were obtained by the fraud of Edward Gandell, who pretended that he was a member of the firm of Gandell & Co., and led the plaintiffs to believe that they were dealing with Gandell & Co. The only doubt I have had was whether there ought not to be a new trial, in order that the question might be submitted to a jury; but I do not think it right to send down the case for a new trial, for it is clear that the plaintiffs believed that they were dealing with Gandell & Co., and therefore there was no contract.

CHANNELL, B.—I am also of opinion that there ought not to be a

new trial, but that the rule ought to be absolute to enter the verdict for the plaintiffs. I do not think that the defendant was in the position of a mere conduit-pipe, *as a carman would have been; [*808 but that he is responsible for the conversion of the goods, and the plaintiffs are entitled to recover provided the goods belong to them. There is no doubt they were originally the plaintiffs' goods, and they must still be theirs unless there has been a contract of sale to divest the property. It is not suggested that there was a sale to Gandell & Co.; and I do not think there was a sale to Gandell & Todd, or either of them; so as to render a repudiation of the contract by the plaintiffs necessary, for it is evident that the plaintiffs believed that they were dealing with Gandell & Co., and never meant to contract with Gandell & Todd.

WILDE, B.—I am of the same opinion. The defendant made advances to Gandell & Todd upon the security of the goods, and under a power of sale he sold them to recoup himself. The defendant now sets up a contract, voidable he admits, between the plaintiffs and Edward Gandell; and if there had been such a contract, and the defendant had sold the goods before the plaintiffs repudiated it, no doubt the defendant would have had a good defence. The real question therefore is, whether there has been such a dealing as amounts to a sale. It is clear that there was no sale to Gandell & Co., because they never authorized Edward Gandell to purchase for them; and it is equally clear that there was no sale to Edward Gandell, because the plaintiffs never intended to deal with him personally. The fact of his name being Gandell cannot affect the question, inasmuch as the dealing was not with him personally, but under the belief that he represented the firm of Gandell & Co. The result is that there was no contract, and the evidence is too strong to render it worth while to submit the case again to a jury. Rule absolute.

*SULLY v. NOBLE and Another. Jan. 30. [*809

Where notice of trial has been given for a particular Sittings, and at the request of the defendant the cause is made a remanet to a subsequent Sittings, a countermand of trial by notice four days before such subsequent Sittings is sufficient.

THIS cause was entered for trial at the first Sittings in Middlesex in the present Term. On the 14th of January, and during the Sittings, the cause was made a remanet to the third sittings, the 28th of January, on the application of the defendants, on the ground that a material witness was in Spain. On the 15th of January a telegraph message was sent to Spain to procure the attendance of the witness. On the 19th of January the plaintiff countermanded his notice of trial, and on the 21st withdrew the record. On the 23d of January the witness arrived in London.

J. Brown now moved for a rule calling on the plaintiff to show cause why he should not pay the defendants their costs of the day incident on his not going to trial pursuant to notice.—By the 48th section of the Common Law Procedure Act, 1852, "a countermand of notice of trial shall be given four days before the time mentioned in

the notice of trial, unless short notice of trial has been given, and then two days before the time mentioned in the notice of trial, unless otherwise ordered by the Court or a Judge, or by consent." The plaintiff having given notice for the Sittings in Term, could only countermand it by a notice four days before those Sittings. The making the cause a remanet was a mere adjournment of it. [MARTIN, B.—The defendant ought not to have the costs of the day, for he received a proper countermand before the third Sittings, and by his own act he practically caused the notice of trial to be given for those Sittings. POLLOCK, C. B.—The defendant, by procuring the cause to be made a remanet, has substituted one Sitting for another.]

Per CURIAM.(a)—There will be no rule. Rule refused.

(a) Pollock, C. B., Martin, B., Channell, B., and Wilde, B.

*810] *HILARY VACATION, 26 VICT. 1863.

HODGSON v. WIGHTMAN. Feb. 4.

The 194th section of the Bankruptcy Act, 1861, applies not only to deeds which comply with and are framed under the 192d section, but to every deed whatever which is or professes to be, or is obviously on the face of it, intended to be a deed of arrangement between a debtor and the whole body of his creditors.

Every such deed, therefore, which is not registered in the Court of Bankruptcy, under the provisions of the 194th section, is inadmissible in evidence.

A deed of composition purported to be entered into between a debtor and the creditors who executed the deed, and the said creditors (stated therein to be or represent, at the least, three-fourths in value of the creditors), in consideration of the payment of a composition, which the debtor covenanted to pay to them by two instalments on specified days, released their debts. It did not appear whether all the creditors, or what proportion of them in number and value executed the deed. In an action by one of the executing creditors against the debtor, the deed of composition being offered in evidence by the defendant in support of a plea of release:—Held, that this was a deed intended to be executed by or binding on the whole body of creditors, and that being unregistered it could not be given in evidence.

DECLARATION by endorsee against acceptor of five bills of exchange, with counts for money received, for interest, and on accounts stated.

Plea (inter alia).—That after the accruing of the said several causes of action, and before this suit, the plaintiff by deed released the defendant therefrom.

At the trial, before Bramwell, B., without a jury, at the London Sittings after last Trinity Term, the following facts appeared.—The action was brought to recover 288*l.* 16*s.* alleged to be due upon five bills of exchange, together with a balance claimed for interest. The defendant, in March, 1862, being in embarrassed circumstances, called a meeting of his creditors and offered them a composition of 6*s.* in the pound, payable by two instalments, which composition the plaintiff agreed to accept upon the sum of 288*l.* 16*s.*, the amount of the bills which were then overdue. A deed of arrangement was accordingly drawn up, which (so far as material) was as follows:—

*“This indenture, made the 31st day of March, 1862, [*811 between George Wightman of, &c., of the one part, and the several persons whose hands and seals are hereto subscribed and affixed (or agents or solicitors of creditors) being creditors of the said George Wightman, of the other part: Whereas the said George Wightman hath for some years last past carried on business in the town of Nottingham; and whereas, owing to the badness of the trade, the said George Wightman hath contracted certain debts to the parties hereto of the second part, and which said respective debts are set opposite to their respective names, and which he is unable to pay in full; and whereas the said parties hereto of the second part, being or representing at the least three-fourths in value of the creditors of the said George Wightman, have agreed to take the sum of 6s. in the pound in full satisfaction and discharge of their respective debts, and to effectually release the said George Wightman from all liability in respect of such debts as aforesaid: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of 6s. paid by the said George Wightman for every pound due by him to them, the said parties hereto of the second part, they, the said parties hereto of the second part (*being or representing, at the least, three-fourths in value of the creditors of the said George Wightman*) so far as in them and each of them lies, do, and each of them doth acquit, release, and discharge the said George Wightman, his executors, administrators, and assigns, from all liability whatsoever with regard to the said debts, or any part thereof. And the said George Wightman, for himself, his executors, administrators, and assigns, doth covenant, promise, and agree to and with the said several parties hereto of the second part, that he, the said George Wightman, will pay or cause to be paid to them, and each *of them, the said [*812 sum of 6s. for every pound due by him to them as aforesaid; such composition of 6s. in the pound to be paid by the said George Wightman by two instalments of 3s. each, the first on the 5th day of May, and the second on the 7th day of July now next ensuing. And they, the said parties hereto of the second part, do, and each of them doth, so far as in them lies, covenant, promise, and agree to and with the said George Wightman, his executors, administrators, and assigns, that they, or any of them, will not make, do or execute, or cause to be made, done or executed any act, deed, matter, or thing whatsoever, whereby the said George Wightman, his executors, administrators, or assigns, shall be prejudiced or made liable with respect to the said deeds from which he is hereby released; and that they, the said parties hereto as aforesaid, do, each of them, accept the said sum of 6s. for every pound in full discharge of their respective debts.”

The deed was executed by the defendant and the plaintiff and by or on behalf of thirteen other creditors. The execution of the deed by the defendant was attested by a solicitor. The amounts of the creditors' debts (that of the plaintiff 288*l.* 16*s.*) were inserted in the deed opposite the signatures of the different creditors. It did not appear whether all the creditors, or if not all how large a proportion in number or value, in fact executed the deed. Conflicting evidence was adduced on the part of the plaintiff and the defendant as to whether there had been any tender by the defendant of the first instal-

ment; and also whether he had refused to pay it unless the plaintiff would accede to new terms: but the learned Judge was of the opinion that there had been neither offer nor refusal to pay the instalment.

The plaintiff's counsel objected to the admissibility of the deed, on the ground that, under the 194th section of the Bankruptcy Act, 1861 [*813] (24 & 25 Vict. c. 134), it *required registration in the Court of Bankruptcy, and in default could not be received in evidence. The deed had not been registered, and the defendant, it was admitted, was not a bankrupt. The learned Judge was of opinion that the deed was not admissible, and directed a verdict to be entered for the plaintiff for the amount claimed; but reserved leave to move to enter the verdict for the defendant.

Archibald, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the release of the 31st of March, 1862, was receivable in evidence, without registration, under the Bankruptcy Act, 1861, and supported the plea.

Hawkins (with whom was *H. James*) showed cause. (a)—First, the deed is not binding on the plaintiff. It was executed by him upon the understanding that the conditions imposed by the 192d, 193d, and 194th sections of the Bankruptcy Act, 1861, would be observed, so that its provisions might bind the whole body of the creditors. It was in the nature of an escrow, only to become operative if the requisitions of the statute were complied with. But, secondly, the deed is inadmissible in evidence. The 194th section, in terms, enacts that "Every deed, instrument, or agreement whatsoever, by which a debtor not being a bankrupt, conveys, or covenants or agrees to convey, his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or [*814] the release or discharge *of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence." That is an express parliamentary prohibition against the admission in evidence of a deed of arrangement between a debtor and his creditors, if not registered within the period which the section specifies. [BRAMWELL, B.—Is it contended that a deed of arrangement must be registered under the 194th section, although that was not the intention of those who executed it?] The comprehensive language of the section, "every deed *whatsoever*, &c.," would warrant that view. The object of the legislature was that there should be a public record of all such instruments.

The Court then called upon

Archibald (with whom was *Ballantine*, Serjt.), to support the rule.—The deed was admissible in evidence without registration under the Bankruptcy Act, 1861, and proved the plea. It does not, on its face, profess, nor are its provisions such as to enable it, to comply with the requi-

(a) Jan. 22. Before Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

tions of the 192d section; (a) and the 194th section extends to no other *class of deeds. [BRAMWELL, B.—The words of section 194 are not “every such deed,” but “every deed whatsoever,” &c.] [*815] If the plaintiff be right, every arrangement between a debtor and his creditors will, by the operation of section 197, (b) be brought under the control of the Court of Bankruptcy. If, on the other hand, sections 194 and 197 be confined to the class of deeds within section 192, the scheme of the Act is intelligible. [WILDE, B.—There is nothing unreasonable in the view that the legislature intended to subject, not merely such deeds as comply with the 192d section, but all deeds of arrangement between a debtor and the whole body of his creditors, to the jurisdiction of the *Court of Bankruptcy, to the extent [*816] which the 197th section contemplates.] This deed is not between the debtor and all his creditors. If a deed of arrangement *with some* of the creditors requires registration, that must be wholly irrespective of the number of them. If so, it follows that a deed which releases the debt of a single creditor must be registered. [MARTIN, B.—This deed invites *all* the creditors to become parties to it.] The benefit of the covenant is confined to those who are parties. Express words of negation are unnecessary to prevent those who are not parties from participating. In *Walter v. Adcock*, 7 H. & N. 541,† the Court unanimously agreed that a deed, which was restricted in its operation to a particular class of creditors, did not comply with the 192d section; and Bramwell, B., was of opinion that it should appear, from the terms of the deed, that all the creditors were to share in its advantages. In the subsequent cases of *Ex parte Rawlings*, 32 L. J. N. S. Bank. 27, and *Ex parte Godden*, in re Shettle, 32 L. J. N. S. Bank. 37, Lord Justice Turner expressed his concurrence in that

(a) Sect. 192.—“Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed.”

Seven conditions follow, of which the first and fourth only are here material.

1. “A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument.”

4. “Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered.”

(b) Sect 197.—“From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors’ assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate and effects in bankruptcy; and, *except where the deed shall expressly provide otherwise*, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy.”

view. [WILDE, B.—Although this deed was never perfected under the 192d section, it is manifest from its language that it was intended to operate under that section upon all the creditors.] The deed could not have been so perfected, since there was no obligation on the debtor to pay any one, except the parties to it. [WILDE, B.—Where the conditions imposed by the 192d section have been observed, creditors who have not executed are placed by the statute in the position of parties. The word “valid” must surely carry benefits as well as obligations.] That argument would, in *Ex parte Rawlings*, and *Ex parte Godden*, in *re Shettle*, have upheld the deed. [WILDE, B.—The deed did not there state that the executing creditors were three-fourths in value of all the creditors, nor was there any indication of an intention that the deed should operate under the 192d section.] The deed contemplated by section 192 must, it is submitted, be entered into by the debtor either with all his creditors, or with a trustee, or with certain creditors *on behalf of the whole body*. [BRAMWELL, B.—This deed may have been, *in fact*, executed by all the creditors. Why are we to assume the contrary? The words of the deed are, not “three-fourths of the creditors,” but “three-fourths of the creditors *at the least*.”] It is sufficient that it does not appear to have been so executed.—Lastly, no tender was necessary. The release is absolute in its terms, and there is no proviso avoiding it upon default in payment of the instalments.—He referred also to *Tabor v. Edwards*, 4 C. B. N. S. 1 (E. C. L. R. vol. 93).

The Court intimated that they would call upon *Hawkins* to continue his argument if necessary. *Cur. adv. vult.*

The judgment of the Court was now delivered (without hearing *Hawkins* further) by

WILDE, B.—This case was tried, without a jury, before my brother Bramwell, when the defendant, who was sued for a debt, offered in evidence a deed of composition, which the plaintiff had executed, releasing the debt. The deed was executed by many creditors, but whether they were in fact all the creditors, or a majority, or three-fourths in value, did not appear. The learned Judge held the deed inadmissible on the ground that it required registration in the Court of Bankruptcy, and that section 194 of the Bankruptcy Act prohibited its being given in evidence. On this point the rule was obtained.

*818] We are of opinion that the rule ought to be discharged, *and the verdict stand for the plaintiff, and that the deed on which the defendant relied was not admissible in evidence. We construe section 194 of the New Bankrupt Act to apply to all deeds whatever, which are, or profess to be, or are obviously on the face of them, intended to be deeds of arrangement or agreement between the debtor and the whole body of his creditors. It was clearly, in our opinion, intended to include, not only deeds complying with and framed under the provisions of section 192, but all other deeds whereby a man may compound or arrange with the whole body of his creditors.

We cannot read the several sections of the Act relating to deeds of arrangement and avoid the conclusion that the scope of the new Act was to subject all such arrangements to the operation (to some extent at least) of the bankrupt laws, leaving it, however, open to the parties,

by express provision in the deed, to qualify and restrain the application of such laws. Now, what is the deed in question? It is a deed professing, on the face of it, to be entered into between the debtor of the one part, and the creditors signing of the other part; and in the operative part of the deed the said creditors, "parties of the second part," are expressly said to be "or represent at the least three-fourths in value of the creditors of the said George Wightman." It is impossible to refer these words to any other intention than that of making the deed one of arrangement which should bind the whole of his creditors under the powers of section 192. If it were really intended to be only an arrangement with certain creditors who should sign the deed, as has been argued, what sense or reasonable meaning or purpose could the words I have quoted have borne? The conclusion as to the intention of the parties seems inevitable, and, as a deed intended to be executed by or binding on the whole body of creditors, it required registration.

Rule discharged.

*In re HARRISON. Feb. 14.

[*819

Where the Registrar of the County Court of the district in which a debtor is in gaol, upon being satisfied that his debts do not exceed 300*l.*, has, under the 101st section of the Bankruptcy Act, 1861, made an order of adjudication in bankruptcy, and directed that it shall be prosecuted in the County Court for the district in which the debtor had resided for the previous six months, the latter Court has jurisdiction notwithstanding it should turn out that the debts in fact exceed 300*l.*

BEASLEY, in last Michaelmas Term, had obtained a rule calling upon the Judge of the County Court of Northamptonshire, holden at Peterborough, and the Registrar of the same Court, to show cause why the adjudication in bankruptcy, made against one Thomas Harrison (at the time of the order of adjudication a prisoner for debt in the gaol of the county of Cambridge) by the Registrar of the County Court of Cambridgeshire, holden at Cambridge, should not be prosecuted in the said County Court of Northamptonshire holden at Peterborough.

It appeared by the affidavits that, on the 6th of February, 1862, Harrison was taken in execution upon a writ of *ca. sa.*, and lodged in the gaol of the county of Cambridge. At that time, and for six months previously, he had resided and carried on business at Whittlesea Fen, within the jurisdiction of the Peterborough County Court. On the 20th of February, having been in prison for fourteen days, he was, in pursuance of the provisions of the 101st section of "The Bankruptcy Act, 1861" (24 & 25 Vict. c. 134), examined by the Registrar of the County Court of Cambridgeshire, who then and there adjudged him a bankrupt, and granted him protection from arrest until the 24th of February (when he was to present himself to the Registrar of the Peterborough County Court), and who ordered him to be discharged from custody, and directed that the bankruptcy should be prosecuted in the County Court at Peterborough. On the 24th of February, Harrison presented himself to the Registrar of the Peterborough County Court, who granted him a renewal of his protection for two days, *stating, however, that he had sent back the papers relating to the bank-

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ruptcy to the Registrar of the County Court of Cambridgeshire, being of opinion that he had no jurisdiction therein. The Registrar of the County Court of Cambridgeshire also refused to proceed further in the matter. On the 23d of June, Harrison, being without protection, presented himself to the Judge, and also to the Registrar, of the Peterborough County Court, sitting in the said Court, with the said order of adjudication, and asked for an appointment for a meeting of creditors, and for the prosecution in his Court of the said adjudication of bankruptcy, but the Judge refused to proceed in the matter, stating that, in his opinion, the Cambridge County Court was the proper Court to act therein, and that he had no jurisdiction. Harrison was, in consequence, still without protection, and unable to obtain an order of discharge. His debts, at the time of his being adjudged a bankrupt, exceeded 300*l.*; but it did not appear by the affidavits that the Registrar of the County Court of Cambridgeshire knew this; and it was assumed, on the argument, that this only became known when Harrison presented himself to the Registrar of the Peterborough County Court.

Giffard showed cause, in Hilary Term (Jan. 31st).—The Judge of the Peterborough County Court had no jurisdiction to proceed with the bankruptcy, the debts of the bankrupt being above 300*l.* The *821] 88th section(a) of the *Bankruptcy Act, 1861, requires every petition for adjudication in bankruptcy to be filed and prosecuted in the Court of Bankruptcy within the district of which the debtor shall have resided or carried on business for the six months preceding the time of filing his petition. By sect. 94.(b) where a debtor petitions for adjudication against himself, and knows or believes that his debts do not exceed 300*l.*, if he shall not be resident in the Metropolitan district, and shall be in custody, he shall file his petition in the County Court for the district in which he is in custody; "but such Court, if it make adjudication, shall transfer the proceedings to the

(a) Section 88.—"Every petition for adjudication of bankruptcy, except as hereinafter provided, shall be filed and prosecuted in the Court of Bankruptcy within the district of which such debtor shall have resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months; but the Court in London may order any such petition to be prosecuted in any district, with or without reference to the district in which the debtor shall have so resided or carried on business, or may consolidate the proceedings or any part thereof under two or more petitions for adjudication of bankruptcy, or may impound any petition for adjudication of bankruptcy, or judgment-debtor summons, and the proceedings thereunder, or any part thereof, upon such terms as the Court shall think fit, or may transfer any petition for adjudication of bankruptcy, or judgment-debtor summons, and the proceedings thereunder, and the prosecution or further prosecution thereof, from the Court in any one district to the Court in any other district or to a County Court having jurisdiction in bankruptcy; and the Court to which any such transfer shall be made may remove the official assignee, and appoint a new official assignee to any such bankruptcy."

(b) Section 94.—"Where a debtor petitions for adjudication against himself, and knows or verily believes the debts justly due and provable under the bankruptcy to amount in the whole to a sum not exceeding three hundred pounds, such fact shall be stated on oath, and if he be resident within the Metropolitan district as herein defined he shall file his petition in the London Court of Bankruptcy; and where such debts shall not exceed three hundred pounds, and the debtor shall not be resident in the Metropolitan district, he shall file his petition in the County Court for the district in which he shall have resided for the six months next before the filing of his petition, or for the longest period during those six months, unless he is in custody, and then in the County Court for the district in which he is in custody; but such Court, if it make adjudication, shall transfer the proceedings to the County Court in which the debtor, if not in custody, would have been required to petition."

County Court in which the debtor, if not in custody, would have been required to petition." The Registrar professed *to act under the 101st section, (a) which provides that the Registrar "shall [*822 have power to make an order of adjudication in bankruptcy against every such prisoner," &c., "and shall also direct in what Court such adjudication shall be prosecuted, *having regard to the amount of debts*, and the place of trade or residence of the prisoner within six months next preceding his imprisonment." Those words show that the 101st section must be construed with reference to the 88th and 94th sections, and that, where the debts exceed 300*l.*, the Registrar has no power to direct that the adjudication in bankruptcy shall be prosecuted in a County Court. The 5 & 6 Vict. c. 116, s. 1, enabled a trader whose debts were less than 300*l.* to petition the Court of Bankruptcy for protection from process. By the 10 & 11 Vict. c. 102, s. 4, the jurisdiction of the Court of Bankruptcy under the 5 & 6 Vict. c. 116, was transferred to the County Courts. So that, at the time the Bankruptcy Act, 1861, passed, the *County Courts had no jurisdiction to entertain a trader's petition if his debts exceeded 300*l.* [*823 The 94th section was framed with regard to that state of the law. In *In re Coombs*, 3 B. & S. 296, the Court of Queen's Bench held that where the debts exceed 300*l.* the County Court has no jurisdiction under the 94th section. [MARTIN, B.—It seems to me that, as regards the amount, the statute is only directory, and that the Registrar must exercise his discretion. Suppose the debtor owed 300*l.* and a penny, would the adjudication in bankruptcy be void?] Although the adjudication would be good, as soon as it appeared that the debts exceed 300*l.* the County Court should transmit the case to the Court of Bankruptcy. [WILDE, B.—The 94th section gives absolute jurisdiction to the County Court where the debtor *believes* his debts do not exceed 300*l.*]

Beasley, in support of the rule.—In the case of *In re Coombs* the prisoner petitioned in formâ pauperis, under the 98th and 99th sections, which contain no limitation as to the amount of debts. By the 98th, any debtor in prison is enabled to petition in formâ pauperis, upon making an affidavit that he has not the means of paying the usual expenses of a petition. By the 99th, the petitioner, if not previously discharged by a Registrar, is to be examined by the County Court of the district touching his estate and debts, and the Court, if

(a) Section 101.—"The Commissioner or County Court Judge, as the case may be, shall in every case on receiving such return make an order that a Registrar of the Court of Bankruptcy, or of the County Court of the district in which the gaol is situate, shall attend at the gaol on a day to be named, being at least seven and not more than twenty-one days from the date of such return. Notice of such order shall be forthwith given to the gaoler and also to the execution and detaining creditors of every prisoner included in such return. On the day named in the order the Registrar shall attend at the prison, and examine every prisoner included in such return who shall have been in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, touching his estate and effects, debts, dealings, and transactions. The Registrar shall also ascertain the last place of abode and business of each such prisoner, within the six months next prior to his imprisonment. The Registrar shall have power to make an order of adjudication in bankruptcy against every such prisoner, and to grant him protection, and to make an order for his release from prison, and shall also direct in what Court such adjudication shall be prosecuted, having regard to the amount of debts and the place of trade or residence of the prisoner within the six months next preceding his imprisonment. The Registrar shall certify the particulars of each case to the Court of which he is Registrar."

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satisfied, is to make an order of adjudication of bankruptcy; but nothing is said as to the Court in which it is to be prosecuted. But, by the 101st, the Registrar, having regard to the matters therein mentioned, is empowered to direct in what Court the adjudication shall be prosecuted. The real amount of the debts cannot be ascertained until a meeting of creditors. [POLLOCK, C. B.—What is to be done *824] if the proceedings go on for a length of *time under the belief that the debts do not exceed 300*l.*, and at last it turns out that they do?] Here the Registrar has decided that the debts do not exceed 300*l.*, and the Court will not interfere with his order of adjudication, as it is good upon the face of it. By the 94th, the debtor may petition, if he “verily believes” that his debts do not exceed 300*l.* It may be that some of them are barred by the Statute of Limitations. In the case of *Re Bowen*, 21 L. J. Q. B. 10, a similar question arose under the 5 & 6 Vict. c. 116.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, B.—The point made on the argument of the rule in this case was, that the order of the Registrar in directing the bankruptcy proceedings to be taken in the County Court of Northamptonshire was illegal and in excess of his powers.

The debtor was in custody in the gaol of the county of Cambridge, and the Registrar of the County Court of Cambridgeshire, acting under section 101, directed the bankruptcy proceedings to be taken in the County Court of Northamptonshire, being the County Court for the district in which the prisoner had resided for the previous six months.

It does not appear what the amount of debts appeared to be upon the examination of the bankrupt by the Registrar under this section. But it does appear that, upon proceeding with the bankruptcy before the County Court, the debts did not amount to more than 300*l.* Upon this ground it is contended that the County Court ceased to have jurisdiction. There are no direct words to that effect in the 101st *825] section. But it is argued that the words “having regard *to the amount of debts” have that meaning. It is said that these words necessarily, or obviously, refer to the limitation of 300*l.* contained in section 94.

We much doubt the propriety of any such construction, for section 94 is not a general one limiting the County Court jurisdiction to bankruptcies of 300*l.*, but only a special provision applicable to cases where the debtor petitions himself.

But if this reasoning be not correct, and if the argument were to prevail that the words above mentioned do refer to section 94, we are still of opinion that the County Court jurisdiction is not taken away by the fact of the debts turning out upon investigation to amount to more than 300*l.*

For in a case coming directly under section 94, the County Court, if the bankrupt swore that his debts were, or that he believed they were, under 300*l.*, would have full jurisdiction whatever the debts might turn out to be. And it would be extremely inconvenient if the legislature had provided otherwise.

If, therefore, section 94 applies at all to this case, all that is neces-

sary to found the jurisdiction of the County Court would be that the Registrar should be satisfied that the debts were not likely to exceed 300*l.*; and for aught that appears he has done so.

The rule will therefore be absolute.

Rule absolute.

***READ v. THE VICTORIA STATION AND PIMLICO RAILWAY COMPANY. Feb. 14. [*826]**

The verdict and judgment upon an inquisition under the compensation clauses of the Lands Clauses Consolidation Act, 1845, do not estop the Company, in an action upon the judgment, from denying that the lands in respect of which the damage has been assessed, and the plaintiff's interest therein, were damaged and injuriously affected by their works. But where the damages claimed and awarded exceed 50*l.* the Company are estopped from denying that the claimant is entitled to compensation to an amount exceeding 50*l.*

DECLARATION.—For that the defendants are the Victoria Station and Pimlico Railway Company, incorporated by the Victoria Station and Pimlico Railway Act, 1858. And for that, after the making and passing and coming into operation of the said Act of Parliament and under the powers and provisions thereof, and the other Acts of Parliament in that behalf, the defendants made and executed certain works upon a certain canal, called "The Grosvenor Canal," which canal was and is the canal mentioned and referred to in the said first-mentioned Act of Parliament as the Grosvenor Canal. And for that, at the time of the making and executing of the said works, and from thence continually hitherto, the plaintiff was lawfully possessed of certain messuages, lands, tenements, and hereditaments, that is to say, all that piece or parcel of ground and wharf, situate, &c., abutting on the said Grosvenor Canal; and also the use of the said canal to the extent of forty feet south-east from the said wharf, and the liberty to moor and lay, and also to load and unload therein all sorts of vessels, barges, and boats, and to make them fast to the south-eastern end of the said wharf; and also the right of free navigation with barges, boats, and other vessels into and out of the said canal to and from the river Thames, with the appurtenances, that is to say, for the residue and remainder of a certain term of ninety-two years and three-quarters of another year, commencing from the Feast Day of St. John the Baptist, in the year of our Lord 1834, to come and unexpired therein. And for that, by the said making and execution of the said [*827] works by the said first-mentioned Act authorized to be executed, the said messuages, lands, tenements, and hereditaments, with the appurtenances, and the plaintiff's said interest in the said messuages, lands, tenements, and hereditaments, were, before and at the time of the giving of the notice hereinafter referred to, damaged and injuriously affected; and the plaintiff, by reason of the several premises aforesaid, sustained a damage and injury, and claimed to be and was entitled, under the statutes in that behalf, to compensation in respect thereof from the defendants to an amount exceeding 50*l.* And for that the defendants did not at any time make the plaintiff compensation or satisfaction for the said damage or injury. And for that afterwards the plaintiff being so entitled to compensation in respect

thereof as aforesaid, and being desirous of having the question of the said compensation settled by a jury, he, the plaintiff, did, under the Acts of Parliament in that behalf, give a notice in writing to the defendants in due form of law; [and did thereby and therein state to the defendants the said nature of his interests in the said messuages, tenements, land, and hereditaments in respect of which he claimed compensation; that he claimed from the defendants compensation in respect of the said damage and injury, and that 2000*l.* should be paid by the defendants to him, the plaintiff, for such compensation; and the plaintiff did also by the said notice state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a special jury, in the manner pointed out in that behalf by the Acts of Parliament in that behalf, unless the defendants should be willing to pay the aforesaid amount of 2000*l.* as compensation which the plaintiff thereby claimed, and enter, within the time limited by the said statute in that behalf, into an agreement for that purpose. And for that the defendants did not *828] afterwards give to the plaintiff any notice *in writing, whereby they, the defendants, made known to the plaintiff that they, the defendants, were ready and willing, and thereby offered to pay to the plaintiff the sum of 2000*l.*, or any other sum in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, in respect of which the said sum of 2000*l.* was so claimed by the plaintiff as aforesaid. And for that the defendants did not nor would pay the amount of 2000*l.* compensation so claimed by the plaintiff as aforesaid; nor did nor would enter into a written agreement for that purpose. And for that the defendants, within twenty-one days of the receipt of the said notice to them so given as aforesaid, did, according to the form of the statute in that behalf, issue their certain warrant in writing under the common seal of the defendants, and directed to the sheriff of the county of Middlesex (being the proper sheriff in that behalf), whereby, after reciting and referring to the said notice, the defendants, pursuant to the powers and authorities given to them by the statutes in that behalf, required the said sheriff to nominate and summon a special jury to inquire of, assess, and determine the sum of money, if any, to be paid by the said defendants as compensation for such alleged damage or injury as in the said notice or claim was mentioned; and the defendants did by their said warrant further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry as were authorized and required by the statutes in that behalf. And the plaintiff avers that such proceedings were thereupon had and taken in due course of law, that afterwards, within the said bailiwick of the said sheriff in the county of Middlesex, a certain inquisition was taken, in pursuance of and in accordance and compliance with the last-mentioned request, before the then sheriff of the said county (being the proper sheriff in that behalf), and twelve honest, lawful, sufficient, and *829] *indifferent men of the said county qualified to serve on juries for trials of issues in her Majesty's Courts of record at Westminster, who were duly impannelled, summoned, returned, and drawn, pursuant to the provisions of the statute in that behalf, by the said sheriff, then being sheriff of the said county of Middlesex as aforesaid,

and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to be inquired of, assessed, ascertained, and determined by them in manner therein mentioned; and the plaintiff and the said defendants by their counsel respectively having, at the time and place of holding of the said inquisition, appeared before the said sheriff and the said jurors touching the matters so in question as aforesaid, the said jurors, upon their oath, did find their verdict that the plaintiff had sustained damages to the amount of 500*l.* by means of the several matters mentioned in the said notice, and that the defendants should pay to the plaintiff the said sum of 500*l.* as and for the damages and compensation referred to in the plaintiff's said notice; and the said sheriff did then and there accordingly, pursuant to the statute in that behalf, give judgment for the said sum of 500*l.*, so assessed by the said jury, to be paid by the defendants to the said plaintiff according to the provisions of the said statutes in that behalf; and the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquisition as aforesaid, duly signed by the said sheriff. And the plaintiff avers that the said verdict and judgment being so duly signed as aforesaid were afterwards, and before the commencement of this suit, deposited and left by the said sheriff with the clerk of the peace of the said county of Middlesex to be by him kept, and the same are now by him kept among the records of the quarter sessions of the said county of Middlesex; *and the said verdict and judgment still remain in full force and effect, and in nowise satisfied, reversed, or annulled. And the plaintiff saith that afterwards, and before the commencement of this suit, in accordance with the statutes in that behalf, the plaintiff's costs of the said inquiry (the plaintiff and the defendants differing as to the amount thereof) were duly settled on the application of the plaintiff by the proper officer in that behalf, then being one of the Masters of the Court of Queen's Bench at Westminster, at a certain sum, to wit, the sum of 287*l.* 18*s.*, of all which the defendants afterwards and before the commencement of this suit had notice.] And the plaintiff saith that, before the commencement of this suit, all things had happened and occurred, and all times had elapsed, which it was necessary should occur, happen, and elapse to entitle the plaintiff to have, receive, and recover from the defendants the said sums of 500*l.* and 287*l.* 18*s.*, and each of them, and to have and maintain this action for the recovery thereof. And the plaintiff saith that he has always been ready and willing to do all things which it was necessary he should be ready and willing to do to entitle him to sue the defendants in this action for the said sums of money, and each of them, and to have, receive, and recover from the defendants the said sums of money, and each of them, and not anything has happened or occurred to prevent the plaintiff from maintaining this action as aforesaid, or recovering as aforesaid from the defendants the said sums of money, and each of them. By reason of which said premises, and by force of the statutes in that behalf, an action has accrued to the plaintiff to demand and have of and from the defendants the said sums of 500*l.* and 287*l.* 18*s.*, and each of them; yet the

defendants have not paid to the plaintiff the said sums of money, or either of them, or any part thereof.

*831] Pleas.—First: that by the said making and execution of *the said works, the said messuages, lands, tenements, and hereditaments, and the plaintiff's said interest therein, were not damaged and injuriously affected as alleged.

Second plea.—That the plaintiff was not entitled to compensation in respect of the said damages and injury to an amount exceeding 50*l*.

Demurrer to pleas, and joinder therein.

Replication to first plea.—That the defendants ought not to be admitted or received to plead the said plea by them first above pleaded; because the plaintiff says that he, being desirous of having the question of the said compensation settled by a jury, as in the first count mentioned, did, as alleged in the said first count, and at the time in that behalf in the said first count mentioned, under the said Acts of Parliament in that behalf, give the said notice in writing, in the first count mentioned, to the defendants in due form of law.—(The replication then repeated all the allegations in the declaration which are above enclosed within brackets.)—And the plaintiff saith that the facts, statements, and allegations made and alleged in the first count are true in substance and in fact; whereupon the plaintiff prays judgment if the defendants ought to be admitted or received, against the said record, to plead the plea by them firstly above pleaded in this suit.

*Replication to second plea.—That the defendants ought not to be admitted or received to plead the said plea by them secondly above pleaded; because the plaintiff says that all the facts alleged in the replication to the defendants' first plea are true in substance and in fact. And the plaintiff in this replication repeats all the allegations in the second replication to the defendants' first plea, and says that such facts occurred as and at the times in that behalf in the said replication alleged; and by the said verdict in the said replication *832] mentioned the said jury did find their verdict *that the plaintiff had sustained damages to a larger amount than 50*l*., that is to say, to the amount of 500*l*., by means of the several matters mentioned in the said notice in the said replication and first count mentioned, and that the defendants should pay to the plaintiff the said sum of 500*l*. as in the said first count mentioned. And the said sheriff did accordingly, as in the said replication mentioned, pursuant to the statute in that behalf, give judgment as in such replication mentioned for a larger sum than 50*l*., that is to say, for the said sum of 500*l*., so assessed by the said jury to be paid by the defendants to the said plaintiff, according to the provisions of the said statutes in that behalf; and the said judgment and record in such replication mentioned and referred to still remains in full force and effect, and in nowise satisfied, reversed, or annulled. And the plaintiff saith that the said facts, statements, and allegations in the said first count are true in substance and in fact; wherefore the plaintiff prays judgment if the defendants ought to be admitted or received, against the said record, to plead the plea by them secondly above pleaded in this suit.

Demurrer to replications, and joinder therein.

Prentice (with whom was *Hawkins*) argued for the plaintiff in last

Michaelmas Term (Nov. 19-21).—The judgment is conclusive, not only as to the fact that damage has been sustained, but also as to the amount of damages. The 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), provides that if the compensation to which any party is entitled in respect of any lands, or of any interest therein, exceeds 50*l.*, and he desires to have it settled by a jury, he may give notice of his desire to the promoters of the undertaking, and they must, within twenty-one days, issue their warrant to the sheriff to summon a jury for settling the same, and in default thereof be liable to pay *the amount of compensation claimed. In the case of *Regina v. The Lancaster and Preston Junction Railway Company*, 6 Q. B. 759 (E. C. L. R. vol. 51), it was held that it was the duty of the jury to inquire whether any damage had been sustained, and if so, to assess the amount. Lord Denman, C. J., there said:—"The question whether any damage has been sustained or not is inseparable from the question, how much damage has been sustained." In *Regina v. The London and North-Western Railway Company*, 3 E. & B. 443 (E. C. L. R. vol. 77), the question arose whether the jury could inquire into the *title* of the claimant. The majority of the Court held that they could not, but were bound to assess compensation upon the assumption that it existed. The question of title also arose in the case of *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 Mac. & G. 155, but it became unnecessary to decide it. In *The London and North-Western Railway Company v. Smith*, 1 Mac. & G. 216, the proceedings under the notice were stayed by injunction until the title of the claimant had been tried. In *Jubb v. The Hull Dock Company*, 9 Q. B. 443 (E. C. L. R. vol. 58), it was held that the words of the Company's Act were large enough to include compensation to a landowner, parting with his premises, for loss which he would sustain by having to give up his business until he could obtain other suitable premises for carrying it on. In *Chabot v. Viscount Morpeth*, 15 Q. B. 446 (E. C. L. R. vol. 69), the sheriff had directed the jury to exclude from their valuation all of the land to which the plaintiff's title could be impeached, and it was held that the verdict and judgment were conclusive, although the direction was wrong. In *Corrigal v. The London and Blackwall Railway Company*, 5 Man. & G. 219, the defendants pleaded, to an action on the judgment, that the jury had *assessed the damages on a wrong principle; but the Court held that the language of their Act was directory only. The Court of Queen's Bench has no power to review the Master's taxation of the costs of the inquisition: *Ross v. The York, Newcastle and Berwick Railway Company*, 5 D. & L. 695; and upon the same principle the judgment is conclusive as to the damage. [CHANNELL, B.—The Master's power is not delegated to him by the Court, and therefore they have no power to review it.] In *Chapman v. The Monmouthshire Railway and Canal Company*, 2 H. & N. 267,† the defendants pleaded that the plaintiff was not entitled to any compensation, and the Court, on the authority of *Regina v. The London and North-Western Railway Company*, 3 E. & B. 443 (E. C. L. R. vol. 77), held that the inquisition was not conclusive evidence of that fact.—The second plea is clearly bad, for it admits that the plaintiff has sustained

some damage. By the 68th section of the Lands Clauses Consolidation Act, 1845, the jury are to assess the amount of compensation "*claimed*," and it is evident that the legislature intended that their assessment should be final.

C. Pollock, contra.—The judgment is no estoppel. *Chapman v. The Monmouthshire Railway and Canal Company* is an express authority that the defendants may show that the plaintiff's interest in the land is not injuriously affected by their works. According to the argument for the plaintiff, he would be entitled to recover the amount of damage upon the mere production of the judgment. The defendants do not, by issuing their warrant, admit that the plaintiff has sustained any damage. There is no means of obtaining a new trial; therefore the defendants ought to have an opportunity of raising any objection to the verdict by plea to the action. The observations of the majority *835] of the Court in *delivering judgment in Regina v. The London and North-Western Railway Company*, 3 E. & B. 443, 466 (E. C. L. R. vol. 77), support the view contended for. The 68th section provides that, if the promoters of the undertaking do not issue their warrant, "*the party entitled*" may recover by action the compensation claimed; so that the question of title would be in issue in that action, and, if established, the judgment must be for the amount claimed. But where the promoters issue their warrant the jury must assess the amount of compensation, and, assuming that they have no jurisdiction to try the title, that question may be raised in an action on the judgment. The judgment of Lord Cottenham, C., in *The London and North-Western Railway Company v. Smith*, 1 Mac. & G. 216, 223, proceeded on the ground that the finding of the sheriff's jury upon the question of title would not be conclusive, but would have to be established in an action on the judgment. In *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 Mac. & G. 155, 170, Lord Truro, C., said:—"It seems to have been doubted whether, by issuing the precept, the Company would not be taken to admit the existence of a right to some compensation; but I cannot see any ground for that conclusion. If the legislature has made it the duty of the Company to issue the precept upon being required to do so at the serious peril of paying the full amount of the claim in the event of the claimant being found entitled, the performance of that imperative duty cannot operate as any admission on the part of the Company. After the compensation jury shall have decided that the claimant has sustained a damage for which he was entitled to recover compensation, the claimant has to enforce judgment. Formerly, the proceeding for that purpose was by mandamus; and if the jury had no jurisdiction to decide upon the right, *836] it follows that the question of right might be raised by a return to the mandamus; but, since the decisions of *Corrigal v. The London and Blackwall Railway Company*, 5 Man. & G. 219 (E. C. L. R. vol. 44), and *Williams v. Jones*, 13 M. & W. 628,† it seems that the remedy of the claimant is by action on the judgment; and the pleadings in *Corrigal v. The London and Blackwall Railway Company* in such an action show that the right might be wholly disputed, supposing, as before stated, a compensation jury had no jurisdiction to decide the question." In *Regina v. The Metropolitan Commis-*

sioners of Sewers, 1 E. & B. 694 (E. C. L. R. vol. 72), it was held that the power in the Metropolitan Sewers Act, 1848 (11 & 12 Vict. c. 112), to resort to arbitration, was given in those cases only where the mere amount of compensation was in dispute, not where the liability to make any compensation was denied. Erle, J., there said that, in his opinion, the 68th section of The Lands Clauses Consolidation Act gave the power of referring to the ordinary Courts the question whether lands have been injuriously affected. In *Mortimer v. The South Wales Railway Company*, 1 E. & E. 375 (E. C. L. R. vol. 102), there were two pleas similar to those in the present case, and Lord Campbell, C. J., said that they were good as tending to show that the judgment was a nullity. The second plea is a denial of a material allegation in the declaration, and without which it would be bad.

Hawkins replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B.—This case comes before the Court upon several demurrers.

The declaration, in substance, states that, the defendants [*837 having been incorporated by "The Victoria Station and Pimlico Railway Act, 1858," and the plaintiff being lawfully possessed of certain messuages, lands, &c., described in the declaration, *his*, the plaintiff's, interest therein was damaged and injuriously affected by the making and execution by the defendants of the works by the Act incorporating them authorized to be made. The declaration then states such formal proceedings as entitled the plaintiff to require the defendants to issue their warrant to the sheriff of Middlesex to summon a jury to assess compensation for such damage; that compensation was duly assessed at, and judgment given by the sheriff for, the sum of 500*l.*, and that the plaintiff's costs were duly settled and ascertained at the sum of 287*l.* 18*s.* For the recovery of these two sums the present action is brought.

To this declaration the defendants pleaded (amongst other pleas):—First, a denial that, by the making and execution of the works, the plaintiff's messuages, &c., and his interest therein, are damaged and injuriously affected as alleged: Secondly, that the plaintiff was not entitled to compensation in respect of the said damage and injury to an amount exceeding 50*l.*

The plaintiff joined issue on these pleas: he also demurred to them, and replied to them specially. The replication to each of these pleas alleges that the defendants ought not to be admitted to plead the said pleas, and, in effect, repeats the allegations in the declaration, and relies on the matters replied as creating an estoppel.

The defendants joined in the plaintiff's demurrer to the defendants' pleas, and they demurred to the plaintiff's replications. These demurrers were argued last Term, before the Lord Chief Baron, my brother Bramwell and myself, by Mr. *Prentice* for the plaintiff, and by Mr. *Charles Pollock* for the defendant, and we took time to consider our judgment.

*The substantial question which arises on these demurrers is whether, the defendants having, in compliance with the 68th [*838 section of the 8 & 9 Vict. c. 18, and in consequence of a claim and notice served on them by the plaintiff to do so, issued their warrant

to the sheriff to summon a jury to settle the compensation to which the plaintiff claimed to be entitled, and compensation having been assessed and judgment given by the sheriff, the defendants can now, when sued on that judgment, set up by way of defence that the plaintiff was not entitled to any compensation; in other words, that his interest in the messuages, lands, &c., in the declaration mentioned, was not in any way damaged and injuriously affected.

We are of opinion that the defendants are not precluded from setting up this defence. They were bound, on the plaintiff's notice and formal compliance by him with the requisites of the 68th section, to issue their warrant within twenty-one days. Had they failed to do so, they would have subjected themselves to a liability to pay the plaintiff the whole amount claimed by him, and to be sued for the same in any of the superior Courts.

The question now before us, viz., how far the verdict of the sheriff's jury, and the judgment thereon, estop the Company from setting up the defence now relied on, is one which has been raised in several cases in Chancery, and opinions upon the point have been expressed by Lord Cottenham in *The London and North Western Railway Company v. Smith*, 1 Mac. & G. 216; by Lord Truro in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 Mac. & G. 155, and in *The London and North Western Railway Company v. Bradley*, 3 Mac. & G. 336.

*839] The opinions so referred to are not express decisions *upon the point, seeing that the question in those cases appears to have been whether there was such an equity as ought to induce the Court of Chancery to restrain the claimant in each case from pursuing his legal remedy given him by the 68th section, until he had established his right to some compensation; and it was with reference to the inconvenience of going to a jury and assessing the compensation, and leaving the question of the plaintiff's right to be afterwards decided, that the point appears to have come under consideration of the Courts of equity: (see *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*, before cited.)

In the case of *Regina v. The London and North Western Railway Company*, 3 E. & B. 443 (E. C. L. R. vol. 77), a majority of the Judges of the Queen's Bench were of opinion that, in an action on the judgment given by the sheriff, the Company sued might, in *such* action, try the claimant's *title* to compensation, though the compensation had in fact been assessed, and though some inconvenience might arise from such a course. Mr. Justice Coleridge's judgment in that case (in which Lord Chief Justice Campbell and Mr. Justice Wightman concurred) reviewed the cases in equity. The Court quashed the verdict of the jury, which had found that a right of way claimed by the claimant did not exist, and had not been proved, and that, on that ground, the plaintiff had not sustained any damage, but had also found a certain amount of damage, on the supposition that the jury were to assume the existence of the way. The Court held that the jury had no power to inquire into the right, but were bound to assess compensation upon the supposition that it existed. Mr. Justice Erle differed from the other Judges, and held that the jury had power to inquire into the right. In commenting upon the cases of *The East*

and West *India Docks and Birmingham Junction Railway Company v. Gattke, 3 Mac. & G. 115, and The South Staffordshire Railway Company v. Hall, 1 Sim. N. S. 373, Mr. Justice Erle observes, that in these cases "it is laid down that if a jury on the inquisition try a question of right over which they have no jurisdiction, the Company, in an action for the amount found by the verdict, may raise for trial that same question of right, and succeed if the judgment is in their favour;" and he adds, "that this principle so expressed is correct," but in his judgment required "further explanation to define what questions are within the jurisdiction of the inquisition, and what are not." In Chapman v. The Monmouthshire Railway and Canal Company, 2 H. & N. 267,† this Court decided in accordance with the decision of the majority of the Court of Queen's Bench in Regina v. The London and North Western Railway Company, 3 E. & B. 443 (E. C. L. R. vol. 77). In Mortimer v. The South Wales Railway Company, 1 E. & E. 375, 382 (E. C. L. R. vol. 102), Lord Campbell, speaking of the first plea in that case, which was in effect the same as the first plea in the present case, says that such plea was a good plea. That, however, cannot be treated as an express decision on the point, as in that case the issue on the plea was found in favour of the plaintiff, and the case turned upon an objection which was not properly raised by any of the pleas there pleaded.

After a consideration of the authorities, we have come to the conclusion that the defendants are not precluded from denying in this action that the plaintiff's interest in the messuages, lands, &c., was at all damaged or injuriously affected. Our judgment, therefore, will be for the defendants upon the first plea, and upon the issues in law consequent thereon.

*The issues in law raised on the second plea admit of a different consideration. That plea simply denies that the plaintiff was entitled to compensation in respect of the damage and injury to an amount exceeding 50l. But we think that that plea is bad. Such a plea could only be good, we think, where the compensation claimed does not exceed the sum of 50l.: see 8 & 9 Vict. c. 18, s. 68. Here the plaintiff claimed more than 50l. On that plea, and the issues in law consequent upon it, our judgment will, therefore, be for the plaintiff. Judgment accordingly.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

WOODS v. FOOTE. Feb. 6.

A composition deed, under the Bankruptcy Act, 1861, made between a debtor of the one part and his creditors whose names were thereunto subscribed and seals affixed of the other part, contained a clause that each of the creditors, covenanting for his acts only, should at all times thereafter indemnify the debtor from and against every bill of exchange, promissory note, and other negotiable instrument on which the debtor might have incurred any liability, or which might have been endorsed or put into circulation by any or either of the creditors.—Held, that such a covenant was unreasonable, and therefore the deed was not binding on a creditor who had not executed or assented to it.

ERROR on a bill of exceptions.—The declaration contained a count by drawer against acceptor of a bill of exchange, dated the 10th January, 1862, for payment of 145*l.* 4*s.* 2*d.* two months after date; and also a count on accounts stated.

Plea.—That after the making of the supposed contracts, and the accruing of the supposed causes of action, to wit, on the 10th March, 1862, the defendant then being a debtor unable to meet his engagements, a deed was made and entered into between the defendant and *842] divers of his *creditors relating to his debts and liabilities and his release therefrom, the same being a composition deed executed by the defendant, so being such debtor, within the true intent and meaning of the Bankruptcy Act, 1861; and all the conditions mentioned in the said Act in that behalf were observed so as to render the said deed as valid, effectual, and binding on all the creditors of the defendant, including the plaintiff, as if they were parties to and duly executed the same; and a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, in writing assented to and approved of the said deed; and the execution of the said deed by the defendant was attested by an attorney, and within twenty-eight days after the execution of the said deed by the defendant, the same was produced and left, being first duly stamped, at the office of the Chief Registrar in bankruptcy for the purpose of being registered, and together with the said deed there was delivered to the said Chief Registrar such affidavit as by the statute in such case made is in that behalf required; and such deed before registration bore such ordinary and ad valorem stamp as in the said statute is in that behalf provided; and the said deed was, within twenty-eight days from and after the execution thereof by the defendant, duly registered in the Court of Bankruptcy, and notice of the filing and registration of the said deed was duly given as required by the said statute; and a certificate of the filing and registration of the said deed, under the hand of the Chief Registrar and the seal of the Court of Bankruptcy, was duly granted to the defendant, which deed was and is in the words and figures following, that is to say:—

“This indenture, made the 10th day of March, A. D. 1862, between Adam Clarke Foote, of, &c., grocer, of the one part, and the several *843] persons whose names are hereunto *subscribed and seals affixed, being creditors respectively of the said A. C. Foote, and who are hereinafter styled ‘the creditors,’ of the other part: Whereas the said A. C. Foote is justly and truly indebted to the said several creditors in the sums set opposite to their names in the schedule hereunder written, as he doth hereby admit and acknowledge. And whereas the said A. C. Foote, being unable to liquidate the amount of such several sums in full, hath proposed to the said creditors to pay them a composition of 7*s.* 6*d.* in the pound, payable by the under-mentioned instalments, namely, 2*s.* 6*d.* in the pound on or before the 10th day of April next; the like sum of 2*s.* 6*d.* in the pound on or before the 10th day of June next; and the further sum of 2*s.* 6*d.* in the pound on or before the 10th day of September next, the payment of which said two last instalments respectively to be secured by the joint and several promissory notes of the said A. C. Foote, John Read

of, &c., and John Fryer of, &c., such promissory notes to be given to the said creditors at the time of the payment of the first instalment. And whereas the said several creditors have agreed to accept such composition at the days and in manner aforesaid in full discharge of their respective debts, and in testimony of such acceptance to enter into and execute these presents: Now this indenture witnesseth, that each of them, the said several creditors, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said A. C. Foote, his executors, &c., that if the said A. C. Foote shall pay to each of them, the said several creditors, the amount of their respective compositions of 7s. 6d. in the pound on their respective debts as appearing in the said schedule hereunder written, that is to say, the sum of 2s. 6d. within one month from the date hereof, and the two further sums of 2s. 6d. each within three and six months respectively from the date hereof; and also upon having secured to *them [844 the payment of the two last instalments as hereinbefore mentioned, each of them, the said creditors, shall and will accept the same in full satisfaction and discharge of all and singular their debts and claims against the said A. C. Foote, and will at any time after the last of such payments shall have been made, upon the request and at the costs of the said A. C. Foote, execute to him, his executors, &c., a good and sufficient release and discharge. And moreover that each of them, the said several creditors, each covenanting for his and their own acts only, shall and will from time to time and at all times hereafter save harmless and keep indemnified the said A. C. Foote, his executors, &c., of, from, and against all and every bill of exchange, promissory note, and other negotiable instrument on which the said A. C. Foote may have incurred any liability, or which may have been endorsed or put into circulation by any or either of the said creditors. In witness whereof," &c.

Averments: that the defendant duly paid to the plaintiff and his said other creditors the said composition of 2s. 6d. in the pound, and delivered to them respectively such joint and several promissory notes, as in the said deed mentioned, for the remaining instalments of the said composition, such promissory notes being payable to the plaintiff or his order, and to the defendant's said other creditors respectively, or their order respectively, which notes have not yet become payable in pursuance of and according to the said deed. And that he, the defendant, has done all things necessary on his part to render the said deed binding on the plaintiff and a bar to this action, and the same was and is a bar to this action.

Replications.—First: the plaintiff takes and joins issue upon the defendant's said plea.

Second.—To the defendant's said plea so far as it relates to the alleged payment to the plaintiff of such composition, *and the [845 alleged delivery to him of such promissory notes as in the said plea alleged: the plaintiff says that he has not in writing or otherwise assented to or approved of the said deed, and has not accepted the said composition and such promissory notes, or either or any of them.

Rejoinder to second replication.—That the defendant did pay and deliver to the plaintiff the said money and notes.—Issue thereon.

The cause was tried before Bramwell, B., at the London Sittings after last Trinity Term, when the defendant gave in evidence the above indenture, which was executed by a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l*. and upwards. All the requirements of the 192*d*, 193*d*, and 194*th* sections of the Bankruptcy Act, 1861, had been fulfilled. The plaintiff refused to sign the deed, or accept the composition or the promissory notes. The first instalment had been duly paid, and the promissory notes had been duly delivered to the creditors who had signed the deed.

The learned Judge ruled that there was no evidence for the jury to find a verdict for the defendant upon the issue joined on the first replication, or upon the issue joined upon the rejoinder to the second replication, and he directed the jury to find a verdict for the plaintiff. Whereupon the defendant's counsel tendered a bill of exceptions; and the case was now argued by (a)

Welsby (with whom was *Gibbons*), for the defendant.—The question, in substance, is whether the composition deed is a bar to the action; and that depends upon whether it is a valid deed under section 192 *846] of the Bankruptcy Act, *1861 (24 & 25 Vict. c. 134). The questions on which its validity depends are, first, whether, under section 192, it is necessary that the deed should contain a transfer of the debtor's property; and, secondly, how far a deed in conformity with that section is binding on creditors who have not executed or assented to it. [*Manisty* said that, after the recent decisions in the Court of Chancery in *In re Shettle*, (b) *In re Rawlins*, (c) and *In re Woodhouse*, (d) he could not support the point as to *cessio bonorum*.] The Bankruptcy Act, 1861, contains two sets of clauses relating to arrangements with creditors. The first begins with the 185*th* and ends with the 191*st* section, and is headed, "As to change from bankruptcy to arrangement." Those clauses only apply where there has been an adjudication of bankruptcy. The other set of clauses begins with the 192*d* section and ends with the 200*th*, and is headed, "As to trust deeds for the benefit of creditors, composition and inspectorship deeds executed by a debtor." These clauses apply where there has been no adjudication of bankruptcy. The 192*d* section provides that the deeds therein mentioned "shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties thereto, and had duly executed the same," provided certain conditions are observed. All conditions necessary to the validity of this deed have been fulfilled; for the 2*d* and 7*th* are inapplicable, there being no trustee and no *cessio bonorum*. This is a deed "entered into between a debtor and his creditors, or some of them," and it relates to the debts or liabilities of the debtor, and his release therefrom. It is a deed which all the creditors might have executed; but if it were necessary that they *847] should do so, it would not be *a deed within the statute, or one which is required to be registered; for the statute contem-

(a) Before Wightman, J., Williams, J., Crompton, J., Byles, J., Blackburn, J., and Keating, J.

(b) C. r. Lords Justices, Nov. 24 and Dec. 6, 1862.

(c) Cor. Lords Justices, Nov. 22, 24, and Dec. 6, 1862.

(d) Cor. Lord Chancellor, Jan. 21, 30, 1863.

plates a deed which is not only not executed by all the creditors, but to which all are not parties. [WILLIAMS, J.—Must not the deed be with respect to all the debtor's liabilities, though it may be with some of the creditors only? WIGHTMAN, J.—The creditors covenant with the debtor that if he "shall pay to each of them *the said several creditors*," that is, the creditors who execute the deed, "the amount of their respective compositions," &c., they will accept the same in satisfaction of their debts. The engagement should be to pay all, not particular creditors.] The 197th section enables all the creditors to have the same benefit in the Court of Bankruptcy as if the debtor had been adjudged a bankrupt. [BLACKBURN, J.—Suppose the plaintiff wanted the promissory notes of the sureties, and the defendant refused to give them, how could he obtain them by going to the Court of Bankruptcy?] In *Walter v. Adcock*, 7 H. & N. 541,† the objection to the deed was that there was no assignment of the debtor's property, but a mere covenant by him to pay his trade creditors a composition on their debts. There Bramwell, B., said "that a composition deed under the Bankruptcy Act, 1861, to be binding upon creditors who have not executed it, must appear, upon the face of it, to be a deed of which any creditor may have the benefit, and may execute without repugnancy." This deed satisfies that condition, for all the creditors may have the benefit of it by executing it. As observed by Parke, B., in *Larpent v. Bibby*, 5 H. L. 481, 497, "in all cases of a conveyance for the benefit of creditors it is for the distribution of the estate amongst the creditors, parties to the deed." [CROMPTON, J.—Where the debtor's estate is administered in bankruptcy, any creditor may have the benefit, but where there is only a covenant with particular *creditors, how is a creditor who is no party to the deed to obtain any benefit under it?] By the 197th section the [*848 Court of Bankruptcy would have jurisdiction over the estate and effects of the debtor, and might order payment of the instalments in the nature of dividends. In *Harris v. Pettit*, 31 L. J., Chan. 552, Stuart, V. C., held that a deed of assignment of a debtor's effects, in trust for all his creditors who should assent thereto within a certain time, was valid, because, as soon as it was executed by the debtor and his trustees, all his creditors were entitled to come in and receive a dividend. [BLACKBURN, J.—Suppose any creditor has put in circulation bills of exchange or promissory notes upon which the debtor has incurred liability, and he is sued upon them; by the covenant at the end of the deed every creditor who executes it becomes liable to indemnify the debtor. CROMPTON, J.—It seems to me most unreasonable that a creditor should be called upon to execute such a deed. BYLES, J.—The effect of the covenant is that any creditor who executes the deed makes himself liable to any amount upon negotiable securities put in circulation by the creditors and to which the debtor was a party.]

Manisty (with whom was *Murphy*) appeared for the plaintiff, but was not called upon to argue.

WIGHTMAN, J.—We are all of opinion that this covenant is one by which a creditor, even if willing to accept the composition, could not be expected to be bound; nor is it one to which he would naturally and reasonably expect that, by executing the deed he would render

himself liable. The Act could never have contemplated that a deed containing such a covenant should be binding on the creditors who *849] did not execute it, and it is unreasonable that a creditor should be excluded from the benefit of the deed unless he becomes a party to such a covenant. Every creditor who executes the deed binds himself to indemnify the debtor against all bills of exchange, promissory notes, and other negotiable securities on which he may have incurred any liability, or which may have been endorsed or put in circulation by any of the creditors; and it seems to us that a covenant by which a creditor is bound to indemnify the debtor against liabilities of an unknown and uncertain amount, whether arising from the failure of the acceptor or the endorsees, is utterly unreasonable. Upon that ground alone, without entering into the other questions which have been raised, we think that this deed cannot be supported.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

SMITH, and Another, Assignees of the Estate and Effects of
WHERRY, a Bankrupt, v. TIMMS and STANTON. Feb. 6.

An assignment, under pressure, by a trader to certain creditors, not of the whole of his property, but with a substantial exception, is not an act of bankruptcy.

Therefore, where a trader, under pressure, assigned to two creditors, who were aware of his insolvency, his household furniture, stock-in-trade, and goods, chattels, and effects in his dwelling-house, which on their sale realised 193*l.*, and the trader also had book debts and tea in bond of the value of 93*l.*:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the assignment was not an act of bankruptcy.

THIS was an appeal against the judgment of the Court of Exchequer in discharging a rule to enter the verdict for the plaintiff, pursuant to leave reserved at the trial. The case stated on appeal was as follows:—

Trover by the assignees of a bankrupt, with a count for money had and received.

*850] *Pleas: to the first count, not guilty, and not possessed: to the second count, never indebted.—Issues thereon.

1. The plaintiffs are the assignees of E. Wherry, a grocer, who was adjudicated bankrupt on a creditor's petition on September 10th, 1860.

2. The defendants are the assignees under a bill of sale, executed by the bankrupt on June 27th, 1860, of property claimed by the plaintiffs on the ground that the execution of the bill of sale was an act of bankruptcy, as a "fraudulent transfer," within sect. 67 of the Bankrupt Law Consolidation Act, 1849.

3. The defendant Timms had lent 50*l.* to the bankrupt in November, 1858; and in respect of that loan, and of goods supplied in the course of business, he was, at the time of the execution of the bill of sale, a creditor for the sum of 88*l.*

4. The defendant Stanton, on the 13th June, 1860, lent the bankrupt 80*l.*, which was secured by a promissory note, payable on demand, signed by the bankrupt and two other persons, the bankrupt at the same time stating that he would repay the money on the 19th of the same month.

5. Two or three days before the bill of sale was given, the bankrupt, being much pressed for money, applied to the defendant Timms for a further loan, and showed him a statement of his affairs, by which he represented himself to be worth a considerable surplus, after payment of all his debts. Timms, however, before making any further advance, insisted on examining for himself into the state of the bankrupt's affairs; and, for that purpose, he, on the 26th June, came from London to Market Deeping, where the bankrupt lived. He there made an investigation which satisfied him that the bankrupt's affairs were in a different state from what he had represented them to be, and that there was a deficiency, which he estimated at 380*l.* He met Stanton *for the first time at the bankrupt's, and, from what [*851 passed at that interview between the two defendants and the bankrupt, Stanton came to the conclusion that the bankrupt's circumstances were in a state of hopeless insolvency. Timms then proposed that the bankrupt should give them a bill of sale, to secure the amounts owing to them respectively, to which, after some pressure, he assented. A solicitor was immediately instructed, and, on the following day, the bill of sale was drawn up, and executed, and put in force.

6. Before the bill of sale was prepared, Wherry and Timms and Stanton went over Wherry's stock and effects in his house, and were satisfied that there was sufficient upon the premises to satisfy their debts.

7. The bill of sale bears date June 27th, 1860, and is from the bankrupt to the defendants. After reciting the sums owing to the defendants respectively as above mentioned, it witnesses that the bankrupt assigns to the defendants "All and singular the household furniture, stock in trade, goods, chattels, and effects whatsoever, of or belonging to him the said Edward Wherry, and which are now in, about, or upon the dwelling-house now in his occupation: to have, hold, and take the same unto the 'defendants,' their executors, administrators, and assigns:" Upon trust to sell the same forthwith, and out of the proceeds to pay the expenses of preparing the bill of sale and registering same, and of the sale, and the rent due, and in the next place to pay themselves their respective debts, and to pay the surplus (if any) to the bankrupt.

8. The bill of sale is executed by all parties, and was duly registered.

9. The defendants immediately entered into possession of the property so assigned, which was sold by auction in the course of the following week. The sum realized by the *sale was (omitting [*852 fractions of a pound) 193*l.*, which, after payment of the auctioneer's charges, yielded a net amount of 160*l.*, which was received, and has been retained by or on behalf of the defendants.

10. Wherry was made a bankrupt on the 6th July, 1860, upon his own petition, but the bankruptcy was annulled, and a fresh adjudication made on petition of the plaintiff Smith.

11. The other property possessed by the bankrupt was his book debts, some tea in bond, and some fixtures. The book debts were, at the time the bill of sale was executed, represented by the bankrupt to amount to the sum of 162*l.*; the amount appearing on the balance sheet was 82*l.*, and the amount subsequently got in or considered good was 68*l.* The tea was, at the time the bill of sale was executed, valued by the bankrupt as worth 45*l.* to sell in the shop, and would have fetched that amount if sold in a regular way; but it was subject to charges of 11*l.* and 4*l.* before it could be had out of the bonded warehouse, and it was sold by the assignees with the charges upon it for 25*l.* The balance sheet was put in evidence, and it appeared that, on the 17th October, 1859, the bankrupt had fixtures which he valued at 20*l.* It was also stated that the bankrupt was informed the defendants had left sufficient fixtures to pay the rent, and that under the bill of sale they sold the stock in trade, furniture, fixtures, and effects, except certain fixtures which they left upon the premises to pay the rent.

12. Besides the sums of 88*l.* and 80*l.*, owing to the two defendants respectively, the amount specified in the bankrupt's schedule, and sworn to by him as owing to the other creditors, was 422*l.*, consisting chiefly of small sums. The amount of debts proved under the petition was 203*l.*

*853] 13. At the trial, at the Nottinghamshire Spring Assizes, 1861, the learned Judge, Mr. Justice Crompton, nonsuited the plaintiffs, on the ground that, the execution of the bill of sale not being a sale of all the bankrupt's property, and there being a surplus, was not of itself an act of bankruptcy, but reserved leave to the plaintiffs to move to enter a verdict for a sum to be settled between the respective counsel, the Court to be at liberty to draw any inferences of fact.

Wills (with whom was *Bristowe*), for the plaintiffs.—The bill of sale was an act of bankruptcy. It was a conveyance of all the bankrupt's property, for though the fixtures are not expressly mentioned in it they would pass under the words "goods, chattels, and effects:" *Pitt v. Shew*, 4 B. & Ald. 206 (E. C. L. R. vol. 6). [BLACKBURN, J.—Property which sold for 193*l.* passed under the assignment, and property to the amount of 93*l.* did not pass.] The excepted property consisted of book debts, which could only be realized by a garnishment process, and tea in bond, which could only be obtained by paying 15*l.* Even if the book debts were of the value stated, the necessary effect of conveying away all other available property was to defeat and delay creditors. Under the 67th section of the Bankrupt Law Consolidation Act, 1849, fraud in fact was not essential to constitute an act of bankruptcy; the test was whether the assignment necessarily tended to defeat or delay creditors. [BLACKBURN, J.—Can it be said that it necessarily has that effect when the debtor assigns property of the value of 196*l.*, and retains property of the value of 93*l.* ?] The defendants, having ascertained that the affairs of the bankrupt were in a different condition from that which he represented, and that he was in a hopeless state *of insolvency, proceeded to examine the property on
*854] the premises, and having ascertained that there was sufficient to satisfy their debts, procured an assignment from him of everything that

was tangible. [BLACKBURN, J.—It was not an assignment of all the bankrupt's property, or all with a colourable exception of part.] In *Stanger v. Walkins*, 19 Beav. 627, Sir J. Romilly set aside an assignment of property *bonâ fide* made, upon pressure, by a trader to a creditor, the trader being either insolvent or in such circumstances that a sale of the effects comprised in the assignment would render him insolvent and both parties having actual or constructive notice of the state of his circumstances. In that case, substantially, all the debtor's property was assigned. In *Smith v. Cannan*, 2 E. & B. 36 (E. C. L. R. vol. 75), and *Graham v. Chapman*, 12 C. B. 85 (E. C. L. R. vol. 74), it was laid down that the necessary consequence of an assignment of what is substantially all the trader's property is to defeat and delay his creditors, and that the existence of a surplus does not prevent it having that effect. [WILLIAMS, J.—*Smith v. Cannan* does not profess to alter the rule laid down by Lord Mansfield in *Worseley v. Demattos*, 1 Burr. 467, and *Wilson v. Day*, 2 Burr. 827. WIGHTMAN, J.—Is there any case in which, where a real and substantial part of the trader's property has not been included in the conveyance, it has been held an act of bankruptcy?] In *Pennell v. Dawson*, 18 C. B. 355 (E. C. L. R. vol. 86), Jervis, C. J., in summing up, said that everything that was tangible was assigned over, except the book debts, and that by the difficulty in collecting them a judgment-creditor would be delayed, instead of finding something on the premises on which he could levy. [BLACKBURN, J.—In *Graham v. Chapman* the deed not only *transferred the whole of the trader's property, but it also gave a [*855 right to take all future-acquired property, even though it should be purchased with the money which was the consideration for the transfer, so that the deed must necessarily have had the effect of delaying creditors. But suppose a trader is in insolvent circumstances and contemplating bankruptcy, and a creditor by pressure obtains from him a portion of his goods, is that an act of bankruptcy?] It would be a question for the jury whether the necessary effect was to defeat and delay creditors. [WIGHTMAN, J.—The result of the authorities is, that where there is a conveyance of the whole of a trader's property, or of the whole with only a colourable exception, that is an act of bankruptcy; but where there is a conveyance under pressure of part, though only a small part remains, that is not an act of bankruptcy.] An assignment of a trader's property with the exception of a real and substantial part is not necessarily an act of bankruptcy, because it may be the means of enabling him to go on with his trade, and so the transaction may be beneficial for his creditors: *Pennell v. Reynolds*, 11 C. B. N. S. 709 (E. C. L. R. vol. 103). That cannot apply here, for no one could obtain any benefit from the assignment but the two creditors to whom it was made. The true criterion is not whether the necessary effect of the deed is to stop the trade, but to defeat and delay creditors: *Hall v. Allnutt*, 18 C. B. 505 (E. C. L. R. vol. 86).

Hayes, Serjt. (with whom was *Bridge*), for the defendant.—Recent decisions establish this principle, that an assignment of the whole of a trader's property, or of the whole with only a colourable exception, which is, in effect, an assignment of the whole, is, of itself, an act of bankruptcy. But in the case of an assignment of a trader's property

*856] *with a substantial exception, in order to defeat the deed fraud must be proved. Where a trader in insolvent circumstances, under pressure, pays a creditor for a large amount, that must, to some extent, defeat and delay the other creditors; but, to invalidate the transaction, there must be actual fraud, or fraud as against the bankrupt law. No case can be cited in which an assignment, under pressure, of part of a trader's property has been held an act of bankruptcy. *Pennell v. Reynolds*, 11 C. B. N. S. 709 (E. C. L. R. vol. 103), is an authority in point.—He was then stopped by the Court.

Wills, in reply, cited *Young v. Waud*, 8 Exch. 221.†

WIGHTMAN, J.—We are all of opinion that, in this case, a substantial part of the trader's property was excepted from the operation of the deed of assignment. No doubt an assignment of the whole of a trader's property is an act of bankruptcy, because the necessary effect of it is to defeat and delay his creditors. For the same reason an assignment, with a colourable exception of part only, is an act of bankruptcy, for it is, in effect, an assignment of the whole. In the present case, however, the portion omitted was not merely a colourable exception, because it appears that it produced, when realized, about one-third of the whole of the trader's property. It must, therefore, be taken as an assignment of a part only of the property; and that was assigned under pressure. It has been decided in several cases that a bona fide assignment by a trader of part of his property in consequence of pressure, is not an act of bankruptcy. The case of *Pennell v. Reynolds* is a decisive authority on that point, for it was there laid down that, "if there be an assignment, not of the whole, but with a real *and substantial exception, in the absence of

*857] fraud that will not be an act of bankruptcy." That is a general proposition, and is in accordance with the established rule of law, and therefore we think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

MEMORANDA.

In last Michaelmas Vacation John Osborne, Esquire, of Lincoln's Inn, and James St. George Burke, Esquire, of the Middle Temple, were appointed her Majesty's counsel.

In the present Hilary Vacation George Stovin Venables, Esquire, of the Inner Temple, was appointed her Majesty's counsel.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

TURNER and Others v. MUCKLOW.(a) *June 3, 1862.*

The production of garrancine is known to be the only purpose for which spent madder can be used. The defendant bought of the plaintiffs a boat-load of spent madder, and it proved insufficient in the production of garrancine. On an action for the price—Held, that the judge rightly asked the jury to find whether the article sold could reasonably be said to be spent madder, and rightly refused to ask whether it was fit to make garrancine.

Per Pollock, C. B.—Refuse does not come under the general rule, that an article is warranted fit for the purpose for which it is known to be bought.

ACTION for goods sold and delivered.—Pleas, payment into Court of 20*l.*, and never indebted as to the residue. Issue thereon. The cause was tried at the Liverpool Spring Assizes, before Mellor, J. It appeared that the plaintiffs were calico printers at Hayfield, in Derbyshire, with a warehouse in Manchester, and that the defendant was a bleacher and manufacturer of a dye called garrancine, at Bury, in Lancashire. The plaintiffs have occasion, in their business, to use a large quantity of madder-root, which is used in the first instance for producing the fine madder dye, and then the refuse is used for producing a dye called garrancine. In some cases the plaintiffs would have occasion to manufacture much more in proportion in the former sort than in the latter, and on such occasions large quantities of spent madder would accumulate in their yard. This was the case on the 8th July in last year, when an agent of the defendant negotiated with the plaintiffs' bookkeeper for the sale of spent madder—that is to say, the refuse of the madder-root after it has been used for producing the finest sort of dye. On the same day one of the firm, who had previously supplied the defendant with a similar article, agreed to let the plaintiffs have a boat-load of this material, about forty tons, at 45*s.* a ton. The material was accordingly delivered to the defendant, and was used by him for the purpose of manufacturing garrancine; but no complaint was made, and the contract was not repudiated until the 20th September. The defendant's evidence showed that when part of this spent madder was converted into garrancine it proved to be of a very inferior quality, so that it could hardly be manufactured into

(a) 6 Law Times 690, 8 Jur. N. S. 870.

garrancine so as to pay the cost of production, and that it was impossible to test the quality of spent madder before it was converted into garrancine. The process by which spent madder is made into a substance capable of producing garrancine is as follows:—The powder of the madder-roots which survives the original production of the fine madder dye is laid in a tank, and mixed with vitriol, and, after the liquid has been withdrawn, the sediment becomes what is called spent madder, used for the production of garrancine. Spent madder is liable to fermentation when it is left to stand; but such a state is not necessarily fatal to its efficiency. The defendant attributed the inferiority of the article to the absence of a sufficient quantity of vitriolic acid, the amount actually put in being sufficient only to neutralize the chalk, which was also put in to contribute to the goodness of the dye. The plaintiffs' evidence tended in some degree to contradict the evidence given by the defendant on this point; but it was not denied that the only known use to which spent madder could be put was the production of garrancine. Indeed, before the invention of the process by which this production is effected, the refuse of the fine madder-roots used to be thrown away as useless. The learned judge, in summing up, directed the jury to find whether the article furnished reasonably answered the description of spent madder; *Monk*, Q. C., the counsel for the defendant, contending, and submitting to his Lordship, that the jury should be asked whether the article furnished was sold for the purpose of making garrancine to the knowledge of both parties, and whether it was really fit to make garrancine. The jury found a verdict for the plaintiffs, with 78*l.* damages beyond the money paid into Court. In Easter Term,

Monk, Q. C., moved for a rule nisi calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection, as stated above.

MARTIN, B., referred to *Emmerton v. Matthews*, 8 Jur. (N. S.) Rep. 61.—Rule nisi granted.

Temple, Q. C., now appeared to show cause, but the Court called on *Monk* and *T. A. Russell* to support the rule.—This is a manufactured article, and therefore there is an obligation on the seller to see that it is fit for the purpose for which it was intended. There is an implied warranty that a thing is fit for the purpose for which it is known to be bought: *Gardiner v. Gray*, 4 Camp. 144; *Jones v. Bright*, 5 Bing. 533 (E. C. L. R. vol. 15); *Shepherd v. Pybus*, 3 Man. & G. 868 (E. C. L. R. vol. 42); *Brown v. Edgington*, 2 Man. & G. 279 (E. C. L. R. vol. 40); *Wieler v. Schilizzi*, 17 C. B. 356 (E. C. L. R. vol. 84); *Burnby v. Bollett*, 16 M. & W. 844.† The Judge told the jury not to inquire whether the article was fit for a particular purpose, but whether it was spent madder. Now, the whole of the evidence was to the effect that if it was not fit for the purpose in question, it was not spent madder at all.

POLLOCK, C. B.—I am of opinion that the rule must be discharged. I once held at Nisi Prius that if a man sells refuse which comes out in the ordinary way, the ruling in *Jones v. Bright*, that the seller warrants an article to be fit for the purpose for which he knows it to be bought, does not apply; and my ruling was afterwards sanctioned by the Court in banc. It may be that in the course of time the sale of

this article may increase, and it may become part of the seller's business to deal in it, and in such a case the warranty might attach. In that case the seller was a bruiser of linseed for extracting a certain substance, and the thing sold was to be crushed seed. The only warranty is, that it really is that which it purports to be. It was said that it was hurtful for cattle; but the seller could not be expected to make any examination to see if it were. It was sufficient if it was crushed seed. The same rule applies here. It makes no difference, in my view, whether all the madder lay on the heap, or was to issue from the works after the order was given. It makes no difference that the seller knows the purpose for which it is wanted. He does not make it for that purpose; he does not care whether it is used for that purpose. The learned Judge left it to the jury whether the article was reasonably the thing bought. Nothing could be more correct; and the propriety of this ruling is fortified by the manner in which the bill of exceptions is drawn up, for had it been proceeded with we should have been bound, as a Court of Error, to overrule it.

MARTIN, B.—I have had occasion to consider this question previously, and I have come to the conclusion that no direction was ever more correct. The article in question was ordered by Taylor on behalf of the defendant, and was accepted by a letter from the plaintiffs. The question is, what did the plaintiffs agree to sell? Spent madder. Then the question for the jury was, whether that which was delivered was spent madder, and that was the question left to them by the learned Judge. I do not see how he could have rightly done otherwise. But Mr. *Monk* says it was not spent madder. Now, I cannot agree to that, for though the evidence was conflicting, yet the result of the defendant's own evidence was, that the article was bad spent madder, but still stuff of that kind. The article must reasonably answer the description; that was the view of Willes, J., with regard to the supply of linseed. Where the sale between the parties is the sale of a specific article no warranty attaches, and the maxim of caveat emptor applies. It is not a profitable method to cite old cases on a subject which has been recently and comprehensively settled. In the case of *Burnby v. Bollet* the rule, as I have stated it, was adopted with the sanction of the whole Court, consisting of Parke, Alderson, and Rolfe, BB. Cases will frequently come near the line and are hard to distinguish. But I think this case is safely within the rule.

CHANNELL, B.(a)—The contract between the plaintiffs and the defendant was for a boat-load of spent madder at 45s. the ton. We are asked to grant a new trial on the ground of misdirection, and not that the verdict was against the weight of evidence. If a rule had been granted on that ground, I give no opinion as to what my decision would have been. I merely refer to it in illustration of my opinion that the learned Judge was right in his direction. Now, I agree that there was no warranty that the article should be spent madder of any particular quality. But it must be spent madder; and if there had not been enough of that matter for a boat-load, the plaintiffs could not have added anything else to complete one. The case is not distinguishable from that in the Common Pleas, in which the

(a) Bramwell, B., had gone to Chambers.

contract was for Calcutta linseed. The summing up of the Chief Justice in that case is substantially equivalent to what was said here by Mellor, J., and substantially the same with the judgment of Willes, J. This brings it within the illustration of Lord Abinger. The article must be an article of that description, but it is not necessary that it should be of any particular quality.

Rule discharged.

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GRIFFITHS and Another v. PENSON.(a) Jan. 20, 1863.

A conveyance by deed of *all that messuage, with the lands, &c., belonging, late in the occupation of B., and which house, lands, &c., are called by the names following* (naming the greater part, but not all, of the closes whereof B.'s farm consisted), was held to pass the closes expressly named only, and not the residue also.

EJECTMENT.—The plaintiffs were devisees in trust under the will of Thomas Penson, deceased. The defendant was the son of the same person. The deceased, Thomas Penson, by an indenture of the 24th May, 1844, conveyed certain lands and hereditaments to trustees, on trust to hold for himself for life, and after his death for his son, the defendant, for life. The description in the deed of the property conveyed was as follows:—"All that messuage or dwelling-house, with the lands and hereditaments thereunto belonging, situate in G., in the parish of G., in the county of Denbigh, now or late in the occupation of R. B., his undertenants or assigns; and which said messuage or dwelling-house, lands, and hereditaments are called, known, or described, by the several names, and contain the several quantities by admeasurement; that is to say, the close A," &c. The deed here gave the names and dimensions of nine closes. The land claimed by this action consisted of four fields, which were not named in the indenture, and which were not included in the measurement assigned to the closes named. At the trial, before Crompton, J., at the Denbighshire Assizes, in the summer of 1862, it appeared that the land in dispute was contiguous to the farm-house actually conveyed by the indenture of 1844. Robert Barratt, the person named in the deed of 1844, was called; and it appeared that the land in question had been held by him, along with the closes which had passed by the deed of 1844 to the defendant, and that the whole was known as Barratt's farm, having been previously held in the same way by previous tenants. The extent of the whole was about forty acres; whereas the united amount of the closes passed under the deed was considerably less. If the land in dispute was not conveyed by the deed of 1844, it passed under the will of Thomas Penson to the trustees. The learned Judge held that the whole of Barratt's farm passed to the defendant by the deed, and that the effect of the grant to that extent was not restrained by the *falsa demonstratio* of the words and measure which followed. He therefore ordered a verdict to be entered for the defendant, reserving leave to the plaintiff to move to set it aside, and enter a verdict for the plaintiff, if the Court should be of opinion that the closes in question did not pass under the deed. In Michaelmas Term,

(a) 9 Jur. N. S. 335.

Welsby having obtained a rule accordingly,

M. Lloyd and *Coxon* now showed cause.—They cited *Lewellyn v. The Earl of Jersey*, 11 M. & W. 183;† *Morrel v. Fisher*, 4 Exch. 591;† *Doe d. Smith v. Galloway*, 5 B. & Ad. 51 (E. C. L. R. vol. 27); *Harrison v. Hyde*, 4 H. & Norm. 805;† *Chamberlaine v. Turner*, Cro. Ch. 129; *Swyft v. Eyres*, Id. 546; *Roe d. Conolly v. Vernon*, 5 East. 51; *Goodtitle d. Radford v. Southern*, 1 Mau. & S. 299; *Doe d. Beach v. The Earl of Jersey*, 1 B. & Ald. 550 (E. C. L. R. vol. 5); *Doe d. Campton v. Carpenter*, 16 Q. B. 181 (E. C. L. R. vol. 71); *Barton v. Dawes*, 10 C. B. 261; *Wood v. Rowcliffe*, 6 Exch. 407;† and *Stukely v. Butler*, Hob. 168.

[*MARTIN*, B., referred to *Maitland v. Mackinnon*, (ante, p. 607).]

Welsby, contra (*M'Intyre* and *Vaughan Williams* with him), was stopped.

POLLOCK, C. B.—The rule must be made absolute. There is no doubt about the rule of law; the only difficulty lies in its application. All cases which turn upon the construction of the words of a deed depend so much upon minute differences, that a very slight matter makes a vast difference. In this case it would be easy to suggest a very trifling alteration, which would have made the long list of cases which we have heard read applicable, and would have given Mr. *Lloyd* some ground to stand on for his argument. But, in truth, in such cases there is very little distinct authority. The rule of law is, that that construction is to be adopted which will give effect to the whole description, without the rejection of any part of it which can possibly be avoided. Applying that rule here, it is plain the plaintiff's construction must prevail.

MARTIN, B.—I agree that the rule must be made absolute. The settlement contains but one description in the parcels, and we must read the whole together as one description, and not stop short in the middle. If it be so read altogether as one sentence, it is impossible not to see that the settlor intended not to convey the closes in question by the settlement. The house and lands are minutely described, with the names and quantities of the different fields comprising the farm which he was conveying, and the pieces of land in question are not there enumerated. If it was his intention that they should be included in the settlement, it is unfortunate that the words used are not sufficient to indicate or to effect any such intention.

WILDE, B.—I am of the same opinion. The rule is abundantly plain that you ought, if you can, to put such a construction upon the words of an instrument as will give a reasonable meaning to the whole passage, and make the whole effectual. It seems to me that Mr. *Welsby's* construction satisfies this rule, and that there is no difficulty in its application. A contrary construction would be opposed to that rule and make it necessary to reject part of the description. Had all the farm been intended to pass, it would have been needless to specify certain parts.

Rule absolute.

ARBON *v.* FUSSELL. (a) Nov. 7, 1883.

When an agreement requiring a stamp is lost, and was without a stamp when last seen, it will be taken that it never was stamped, and secondary evidence of it cannot be received.

DECLARATION on an agreement for the use of carriage horses, until the determination thereof by three months' notice, for 37*l.* 10*s.* a quarter. Breach, that the defendant put an end to the said agreement without three months' notice. There were also common counts. The defendant traversed the agreement alleged in the declaration, and took issue on the common counts. The cause was tried at the Middlesex Sittings after Trinity Term, before Wilde, B., when it appeared an agreement had been made between the plaintiffs and the defendant on the subject of the hire of horses; a copy thereof was signed by the defendant, and given to the plaintiffs, and a duplicate was signed by the plaintiffs, and sent to the defendant. The copy which was signed by the defendant having been lost in the plaintiffs' hands, they proposed to give secondary evidence of its contents; but as it appeared that it had never been stamped when it was last seen, the learned Judge refused to receive secondary evidence. The defendant had had notice to produce the duplicate signed by the plaintiffs, but she did not produce it, and as it had not been stamped when last seen, the Judge refused to receive secondary evidence of its contents. A verdict having been found for the defendant,

Garth moved for a new trial, on the ground that this evidence should have been received.

POLLOCK, C. B.—There will be no rule. It is contended that it should be presumed that the defendant's part of the document was stamped. I cannot see what foundation there is for such a supposition. In the case of instruments for not stamping which there is a penalty, it may be that where they have been acted upon, it is right to presume that they have been stamped; but there is no penalty for not stamping an agreement beyond the inconvenience of being unable to give it in evidence without the payment of a fine, in addition to the stamp. Therefore the doctrine of "*omnia rite acta*" does not apply.

BRAMWELL, B.—I think my Brother Wilde was quite right in his ruling. If he was right in coming to the conclusion that the instrument was not stamped, he was right in keeping it from the jury. I own I think the proper conclusion to come to under the circumstances is, that it was not stamped; for it being proved that it was not stamped when it was sent by the plaintiffs to the defendant, the presumption is strongly against its having been subsequently stamped.

CHANNELL, B.—I agree with my Lord Chief Baron and my Brother Bramwell. Rule refused.

IN THE HOUSE OF LORDS.

[Before Lord CRANWORTH, Lord WENSLEYDALE, Lord CHELMSFORD,
and other Lords.]

THE ATTORNEY-GENERAL v. FLOYER.(a) *June 13, 17, and 23,*
and July 15, 1862.

H. B., tenant for life, and W. J. B., his eldest son, tenant in tail in remainder, suffered a recovery, and in 1821, by virtue of a joint power of appointment, which they exercised, resettled the estates to the use of the father for life, with remainder to the son for life, with remainders to his sons in tail male, with remainder to G. B. and the son of H. B. for life, with remainder to his sons in tail male. The father died in 1834, and his son entered into possession, but died in 1856, without issue. G. B. then came into possession, and joined with his son E. G. B. in disentailing the estates; and by virtue of a power of appointment reserved to them, conveyed the estates to the defendants for a term of 500 years, upon trust in case the son survived his father (an event which happened), to pay him an annuity during his life; and power was given to the father to raise portions for younger children, which power he exercised.—Held (reversing the decision of the Court of Exchequer), that the Crown was entitled to duty at 3l. per cent. in respect of the succession of G. B., as having been derived from his elder brother W. J. B., as predecessor; that the same amount of duty was payable in respect of the succession of E. G. B., as having been derived under a disposition made by himself at the time when he was expectantly entitled to the estates, upon a succession derived from W. J. B., as predecessor; and further, that the same amount of duty was payable in respect of the portions of the younger children, as being derived from either their niece W. J. B., or their own brother E. G. B., as predecessor.

THIS was an appeal from a decision of the Court of Exchequer, pronounced in a suit instituted on behalf of the Crown, for the recovery of succession duty, the question being as to the rate at which such duty ought to be calculated. The facts were these:—In 1810, Henry Bankes being tenant for life, and his son, William John Bankes, being tenant in tail in remainder expectant on his father's death of certain settled estates, joined in suffering a recovery, and barring the entail and resettling the property, to such uses as the father and son jointly should appoint; and in default of such appointment, to the use of the father for life, in confirmation of his former estate; with remainder to such uses as the son, if surviving the father, should appoint; with remainder to the old uses. In 1821 the father and son exercised their joint power, and limited the settled estates (subject to a power which they never exercised) to Henry Bankes (the father) for life; with remainder to his son, William John Bankes, for life, and to his sons in tail male; with remainder to George Bankes (another son of Henry) for life, and to his sons in tail male; with remainders over. And power was given to the successive tenants for life when in possession, to charge portions for daughters and younger sons. Henry Bankes, the father, and first tenant for life, died in 1834, and was succeeded by his son, William John Bankes, upon whose death without issue in 1855, after the commencement of the Succession Duty Act, George Bankes, his next brother, became tenant for life in possession. The Crown claimed duty at the rate of 3l. per cent. in respect of the succession of George Bankes, as having been wholly derived

(a) 31 Law Journal 404, 7 Law Times 47.

by him from his elder brother, William John Bankes, as predecessor. The Court of Exchequer decided that the rate of duty was 3*l.* per cent. on one moiety only, as being derived from the brother, and 1*l.* per cent. on the other moiety, as being derived from the father, Henry Bankes. The next point was, as to the rate of duty payable by Edmund George Bankes, who was the eldest son of George Bankes, and as such, tenant in tail of the settled estates in remainder expectant on his father's death. By a disentailing deed, dated the 2d July, 1855, Edmund George Bankes, with the consent of his father, as protector of the settlement, disentailed the settled estates, and conveyed them to such uses as the father and son jointly should appoint; and in default of appointment, to the old uses. And by an indenture, dated the following day, the father and son exercised their joint power of appointment, and limited the settled estates (subject to a power which they never exercised) to the defendants Floyer and Seymer, for a term of 500 years, and subject thereto, to George Bankes for life, with remainder over. The trusts of the terms were declared to be (*inter alia*), in case Edmund George Bankes survived his father, the tenant for life to pay him 4000*l.* a year during his life, or until he should become a bankrupt. And power was given to George Bankes, the tenant for life, to charge portions for daughters and younger children. George Bankes died in 1856, and thereupon his son, Edmund George Bankes, became beneficially entitled to the provision made for him by the deeds of July, 1855, out of the settled estates. Under these circumstances the Crown claimed duty at the rate of 3*l.* per cent. in respect of the succession of Edmund George Bankes, under section 12 of the Succession Duty Act, as having been derived under a disposition made by himself, at the date of which he was expectantly entitled to the settled estates, as a succession derived from his uncle, William John Bankes, as predecessor, and in respect of which, it was contended, he would have paid duty at that rate if no such disposition by himself had been made. The Court of Exchequer decided that the rate of duty was the same as in the previous instance, viz., 3*l.* per cent. on one moiety, and 1*l.* per cent. on the other moiety. The last question was, as to the rate of duty payable on the portions of the younger children of George Bankes, the tenant for life, under the settlement of 1855, who, by his will, in exercise of the powers for that purpose contained in the deeds of 1821 and 1855, respectively charged the settled estates with portions for his younger children, and appointed all the defendants his executors. The Crown claimed duty at the rate of 3*l.* per cent. in respect of the successions of the younger children, as being derived from either their uncle, William John Bankes, or their own brother, Edmund George Bankes, as predecessor. The Court of Exchequer had decided that the proper rate of duty was 1*l.* per cent. only. The present appeal was then presented by the Crown. The case is reported 7 Jur., N. S. 1068.

The Attorney-General (Sir W. Atherton), *The Solicitor-General* (Sir R. Palmer), and *Hanson*, for the appellant.

Rolt, Q. C., *M. Smith*, Q. C., and *C. Hall*, for the respondents.

LORD CRANWORTH.—My Lords, I do not think that this case can be distinguished from that of *Lord Braybrooke v. The Attorney-General*, 7 Jur., N. S., 741. There, a stranger in blood devised real

estates to Richard Aldworth Neville for life, with remainder to his son, Richard Neville, for life, with remainder to his first and other sons in tail male. Richard Aldworth Neville, who had become the second Lord Braybrooke, died in 1825, and on his death Richard Neville, his son, who then became the third Lord Braybrooke, became tenant for life under the will, with remainder to his first and other sons in tail male. In 1841 the third Lord Braybrooke concurred with his eldest son, who had then attained his age of twenty-one years, in barring the entail and resettling the estate (subject to his own life estate under the will, and subject also to certain terms of years for securing the payment of some annuities and other charges), to such uses as he and his said son should appoint; and in default of appointment, to the use of his said son for life, with remainder to his first and other sons in tail male, with remainders over. In 1850 Lord Braybrooke and his said son exercised their joint power, and appointed the estates, subject to certain annuities and charges, to the same uses as had been declared by the deed of 1841. The third Lord Braybrooke died in 1858, and the question then arose as to the succession duty payable by his son, who then became the fourth Lord Braybrooke. He took an estate for life under the joint appointment of his father and himself; and in order to determine at what rate the duty was to be charged, it was necessary to ascertain who was his predecessor, within the meaning of the Succession Duty Act, the rate of duty in all cases depending on the degree of relationship subsisting between the predecessor and the successor. On behalf of the son it was argued, that as he took, on the death of his father, under the joint appointment of his father and himself, the father was the predecessor; in which case a duty of 12. per cent. only would be payable on the whole estate; or if not so, then that the father and the son himself were joint predecessors; in which case a duty of 12. per cent. only, would be payable on a moiety. But the Court of Exchequer first, and afterwards the House of Lords, held that the father was not, either solely or jointly, a predecessor; that the son was the sole predecessor; and that in the language of the 2d section, he alone was the settlor from whom the interest of the son was derived. That being so, the case was clearly one to which the 12th section was applicable; for that section provides, that when a successor takes under a disposition made by himself, the same duty shall be payable as would have been payable if no disposition had been made by the person thus filling the character both of predecessor and successor. If no disposition had been made by the son, he would have taken, on his father's death, as successor to the original deviser, a stranger in blood; in which case a duty of 102. per cent. is payable. And the Court of Exchequer first, and the House of Lords afterwards, held accordingly, that duty was payable at that rate. The son was held to be the sole predecessor. The ground of decision evidently was, that although the estate of the son arose under a joint appointment made by his father and himself, and although, therefore, the father was in a sense one of the settlors, yet he was not a settlor from whom the interest, or any part of the interest, of the son, in his character of successor, was derived. The interest of the son, as successor, was derived wholly out of his own prior estate tail, and in no respect from

the estate of his father. This decision appears to me to govern the present case. Here Henry Bankes and his eldest son, William John, concurred, in 1810, in suffering a recovery of certain settled estates, and in 1821, by virtue of a joint power of appointment reserved to them by the deed creating the tenant to the præcipe, they resettled the estates to the use of Henry, the father, for life; with remainder to William John for his life; with remainder to his first and other sons in tail male; with remainder to George, second son of Henry, for his life; with remainder to his first and other sons in tail male; with remainder over. Henry, the father, died in 1834, and William John, the son, then succeeded to the estate, and he died, without issue, in 1855. As he succeeded to the estate before the passing of the Succession Duty Act, the precise question which was decided in Lord Braybrooke's case never arose; but if Henry, the father, had lived till 1854, instead of dying in 1834, it is certain, on the authority of Lord Braybrooke's case, that William John, on succeeding in 1854, would have been held to be the sole settlor, for the purpose of ascertaining the succession duty payable by him. If he would have been the sole settlor for that purpose, I cannot understand on what principle it can be contended that the interest of those coming after him in the settlement were derived from any other source than that from which his own interest was derived. If he would have been held to be within the meaning of the act, the sole settlor from whom his own tenancy for life was derived, he was the sole settlor from whom the interests of his children, if he had had any, and those coming after them in the settlement, were derived. Those interests all come out of the same estate as that out of which his own tenancy for life was derived. And the decision of the House shows, that in order to ascertain who is the settlor within the 2d section, *i. e.* the settlor from whom the interest of the successor is derived, we must inquire, not who are the parties by whose conveyance the estate has been created, but who is the conveying party out of whose estate the interest in question has been derived. It can make no difference as to the rate of duty payable; that William John never was himself liable to duty, by reason of his father having died before the passing of the act. I am, therefore, of opinion that George, in succeeding to his brother, was liable to duty at 8*l.* per cent. The next question is as to the rate of duty payable by Edmund George, the eldest son of George, on the death of his father. The same principles are applicable to this case as to that of George. George and his eldest son, Edmund George, became respectively on the death of William John, tenant for life in possession and tenant in tail in remainder. They executed a disentailing deed, reserving to themselves a joint power of appointment, under which they made a joint appointment resettling the estate, so that George continued to be tenant for life, but Edmund George was content to take instead of his remainder in tail, an annuity of 4000*l.* a year for his life, charged on the settled property, to commence at his father's death. George, the father, died in 1856, on which event Edmund George became a successor to the extent of 4000*l.* a year. Who was his predecessor? The Braybrooke case has decided that he was his own sole predecessor, and therefore under the 12th section duty is payable at the rate at which it would have been payable if the entail of 1821

had not been barred in 1855. This rate is, in my opinion, 3*l.* per cent., as I have already explained in the case of George. The only remaining question is as to the rate of duty payable on the portions of the younger children of George. I am unable to distinguish this from the two former cases. The portions are in substance a part of the inheritance. If, instead of arising under the exercise of a power given to the parent, they had been at once fixed by the settlement which created the power, there could surely be no doubt but that they must have followed the fate of the inheritance; and I am of opinion that the circumstance of their arising under a power can make no difference. Indeed, this seems to be expressly provided for by the 4th section of the act. The interest created by the power must, on well-known principles, be treated as arising from the deed creating the power; and in this case it is unnecessary to consider whether we are to refer to the settlement of 1821 or to that of 1855 as the source of the power. The rate of duty will be the same to whichever settlement we refer. It was argued that here the father ought to be considered as a purchaser of the right to appoint the portions, and so that he was the settlor from whom the interests of the younger children were derived; and this view of the case was attempted to be supported by reference to *Jenkinson's case*, before the Master of the Rolls, 24 Beav. 64, and *Yelverton's case*, 7 H. & Norm. 306.† But those cases do not support the proposition contended for. In both those cases the Court considered that the tenant for life had, in the result of his dealings with the property, become a creditor on the estate for a sum of money, payable on a future day. That being so, the persons who, under the disposition which he made of the money, became entitled to it at his death, were properly held to be successors, deriving title from him as their sole predecessor. He was according to the decision absolute owner of the money. But here the interest of the younger children was not derived from any fund to which George was entitled. He never was a creditor on the estate. The cases are, therefore, altogether different. It was further pressed, that in holding the brother or uncle to be the settlor, from whom the younger children derive their portions, and not the father, we should be coming to a decision at variance with all the ordinary notions of mankind—that, in a popular view of the case, every one would say that the portions were derived from the father. To a certain extent that is true, but what we have to decide is, who is the settlor within the meaning of the statute? And, as I have already explained, I think that the decision in the *Braybrooke* case necessarily leads to the conclusion that the settlor, within the true meaning of the 2d section, must be a settlor out of whose estate the succession is derived, and so that, though the act of the father in making the appointment was necessary to the creation of the portions, yet that, as they did not to any extent come out of his estate, he was not the settlor within the meaning of the statute. I observe that the Judges of the Court of Exchequer say that their judgment, now under review in this House, was prepared before your Lordships had decided the *Braybrooke* case, though they further state that the decision of your Lordships is not inconsistent with their judgment. It will be apparent from what I have said that in that statement I am unable to concur. The Judges say that George got his estate not by his own act, but by

the joint act of his father and his brother. The same thing precisely might have been said in Lord Braybrooke's case. The fourth lord got his estate not by his own act, but by the joint act of his father and himself. With all deference to the Judges of the Court of Exchequer, I cannot see the difference in principle between the two cases, and therefore I think their judgment is wrong. The result is, that in my opinion the rate of duty payable on the succession of George, of Edmund George, and of George's younger children, is 3*l.* per cent. It was not disputed by the Solicitor-General that, in calculating the sum due, allowance must be made for the annuity to which the parties chargeable with duty were already entitled when the duty occurred. There will, I presume, be no difficulty in adjusting the amount due, taking it as established that the rate chargeable is 3*l.* per cent. on the estates included in the recovery of 1810. It was, however, admitted that a part of the estates included in the settlement of 1821 were fee-simple estates of Henry's. As to these, the duty is certainly payable only at the rate of 1*l.* per cent.; and with respect to the portions, they must, for the purpose of regulating the duty, be apportioned rateably between the settled and fee-simple estates according to their value. The duty on so much as is attributable to the original settled estates will be assessed at 3*l.* per cent.; that assessed on the fee-simple estates, brought into settlement for the first time in 1821, will be assessed at 1*l.* per cent. I am authorized by my noble and learned friend, Lord Chelmsford, who unfortunately is detained at the Privy Council, and is unable to attend here to-day, to say that he entirely concurs in the view which I have expressed to your Lordships.

LORD WENSLEYDALE.—My Lords, there is no doubt that the decision of the majority of your Lordships in the case of *The Attorney-General v. Lord Braybrooke*, is just as binding as if the whole House had concurred in it; and the ratio decidendi in that case must govern all other cases in this House, and in all inferior tribunals. We have, therefore, merely to ascertain what was the rule laid down by the late Lord Chancellor (Lord Campbell) and Lord Kingsdown, according to which their Lordships decided; and that rule must unquestionably govern other cases. I have given the subject every consideration in my power; my two noble and learned friends concur in a view of the case which must decide the present; and, after some doubt, I agree in that view. In that case, Lord Howard De Walden devised the Audley End estates to Richard Aldworth Neville for life, remainder to his eldest son Richard Neville for life, remainder to the first and other sons of the body of the said Richard Neville in tail. The appellant was the eldest son and tenant in tail in remainder, and he joined with the tenant for life in executing a disentailing deed in 1841. The appellant, with the consent of Lord Braybrooke, as protector of the settlement, conveyed the estate, to hold to such uses as Lord Braybrooke and the appellant should appoint; and in default, to the appellant for life, with remainder over. In January, 1856, Lord Braybrooke and the appellant executed a joint deed of appointment to Lord Braybrooke for life, remainder to the appellant for life, remainder to his first and other sons in tail. New considerations were reciprocally given as the price of the execution of that joint power acquired by the disentailing deed; amongst others, the appellant

himself giving up some of his own rights to his father, which I thought had the effect of giving different interests from those taken under the will of Lord Howard De Walden, and that the appellant no longer had his succession under that will, but under a new title. This opinion was overruled by my two noble and learned friends, and must be considered as properly overruled. They decided that the case fell under the 12th section; that the appellant took a succession under a disposition made by himself, within the meaning of that section; and inasmuch as, at the date of that disposition, the appellant was entitled to the property comprised in the succession expectant on his father's death (who died after the Succession Duty Act, and during the continuance of the disposition), that he was chargeable with the duty at the same rate as if no such disposition had been made. They might have decided only, that as the new disposition made by the deed of 1856, in which he concurred, was ineffectual to alter his condition under the will of Lord Howard De Walden, by the express provision of the 12th section, it was unnecessary to make any further inquiry whether that disposition was one by the appellant alone, or by his father and the appellant jointly; and therefore their decision upon the latter question was unnecessary, and was not intended by them to be made the ground of their decision. It is possible, from what Bramwell, B., says, as to the inapplicability of the case of *The Attorney-General v. Lord Braybrooke*, that he may have supposed (the report not being then published) that such might have been the ground of decision. But I agree, after entertaining some doubt, with my noble and learned friends, that the majority of the House in Lord Braybrooke's case, meant to decide that the appellant claimed the succession under a disposition made by himself, and by himself only; and that he claimed the succession from himself only as predecessor, as created out of his own estate tail only. If derived from his own father's estate for life in part, he ought to have been subjected, in respect of that part, to a duty of 1*l.* per cent. only. But the majority of your Lordships held, that he claimed altogether under a disposition made by himself alone, and therefore was liable to the full duty of 10*l.* per cent., as he certainly would be if there had been no such subsequent disposition. The decision in Lord Braybrooke's case is, therefore, in effect, that if the tenant in tail in remainder joins with the tenant for life in executing a general power of appointment to another, the interest of the appointee is derived from the tenant in tail in remainder, and must be charged with succession duty accordingly. That decision, therefore must govern this case. The succession of George Bankes must so be taken to have been derived from his brother William John as predecessor; that of Edmund George Bankes from his uncle William John Bankes as predecessor; and that of the children of George Bankes from their uncle William John Bankes, or their own brother. Of course the order must be altered, by making a deduction of the value of the annuity, and a reduction of 1*l.* per cent. on the value of the land brought into settlement by Henry Bankes the younger.

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Upon the reference, by Judge's order, of an action for several breaches of a farming agreement, after plea, and before issue joined, it was ordered that the costs of the reference should abide the event. The arbitrators found, as to

one breach, that the plaintiff had sustained damages to the extent of 16s., and on all other points substantially in the defendant's favour.—Held, that the plaintiff was not entitled to any costs of the reference: as the event was not in his favour, and there being no issues, the costs were not apportionable. *Kelcey v. Stepples*, 576

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ASSAULT.

Right of British Subject to maintain Action against another British Subject for Assault committed in Foreign Country, where Proceedings have been taken, and are pending in that Country.

A British subject may maintain, in the Courts of this country, an action against another British subject for an assault committed in a foreign country, notwithstanding proceedings have been taken at his instance, and are pending, in a Court of that country, in respect of the same assault and battery.

To an action for assault and false imprisonment the defendant pleaded:—First: (except as to the imprisonment), that the trespasses were committed at Naples, and that the plaintiff and defendant resided there and were amenable to the laws there in force; that proceedings were taken, at the instance of the plaintiff, before the Judge of a certain Court at Naples, according to the articles of the penal procedure laws of that country: and that according to the law of that country the defendant was not liable to be sued by the plaintiff in any civil action, or other proceedings, to recover damages for the alleged trespasses, nor liable to any other proceedings in respect of the trespasses except those taken and instituted under the laws aforesaid and which were still pending and undetermined in the said Court at Naples.—Secondly: (except as to the

imprisonment), that according to the law of Naples the defendant was not liable to be sued by the plaintiff, and he could not recover any damages in a civil action, or other proceeding, for the alleged trespasses until the defendant had been condemned and found guilty of those trespasses, or some part thereof, in the said penal proceedings which were still pending and undetermined.—Thirdly; (as to the imprisonment), that according to the law of Naples the defendant was liable to certain penal proceedings for the said imprisonment, if not authorized by the law of the country; and that, according to the law of the country, no civil action, or other proceedings, could be maintained to recover damages for the imprisonment, if illegal, until after the defendant had been condemned and found guilty of the illegal imprisonment in such penal proceeding; and that the defendant had not been condemned in such penal proceedings, nor had the plaintiff taken any such penal proceedings against the defendant, or endeavoured to procure him to be condemned or found guilty of the said imprisonment.—Held, that the meaning of the first plea was that proceedings had been taken and were pending, at the instance of the plaintiff, in the Neapolitan Court, and that except those proceedings none could there be taken; and if so, the plea did not negative that those were proceedings in which a compensation or damages might be recovered, and therefore the plea was bad.

Held, that the second and third pleas were also bad, for they disclosed mere matter of procedure, to be governed by the *lex fori*; since they assumed that the acts complained of were the subject of civil proceedings in Naples to recover damages; but that as a preliminary there must be a penal proceeding and conviction.

Held also, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the first plea did not contain any averment that damages might not be recovered by the law of Naples for the alleged trespasses, and without such an averment it must be taken as against the defendant that they might; and if so, the question was one of procedure merely, and governed by the *lex fori*; and there was nothing to oust the jurisdiction of the English Courts to entertain an action to recover damages.

Held, also, that a British subject may maintain an action in this country against another British subject to recover damages for an assault and battery committed in a foreign country; although by the law of that country no damages are recoverable for such trespasses:—*Per Wightman, J.*

Held also, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the second and third pleas were bad, since they merely disclosed an objection to procedure which must be determined by

the *lex fori*, not the *lex loci*; that in effect the second plea amounted to no more than another action pendant in a foreign country. *Scott v. Lord Seymour*, 219

ASSESSED TAXES.

Meaning of Words "Reside or Be" in 43 Geo. 3, c. 161, ss. 25, 27.

The words "reside or be" in the Assessed Taxes Act, 43 Geo. 3, c. 161, ss. 25, 27, do not necessarily mean "dwell" or "sleep." Section 27 imposes the obligation upon one, who in person carries on business, to make a return in the parish in which his place of business is situate, whether he sleeps there or not, of articles liable to duty kept, but not returned, elsewhere.

One penalty only is incurred by the omission in any one year to return several lists, and to make the return in several places. *The Attorney-General v. M'Lean*, 750

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ATTORNEY.

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Neglect to show Cause against Rule to answer Matters of Affidavit.

When an attorney does not appear to show cause against a rule calling on him to answer the matters of an affidavit, the Court will make the rule absolute to answer within a certain time, and in default that an attachment issue against him, and also that he be struck off the roll. *In re Worman*, 636

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Implied Contract to indemnify against Acceptances upon Production of properly endorsed Bill of Lading.

The defendant, a merchant at Newcastle, was a customer of the plaintiffs, bankers at Newcastle, whose London agent was the Union Bank. H., a merchant at Wolgast in Prussia, wrote to the defendant stating that he was inclined to consign to him a cargo of wheat, and

asking for how much and at what date the defendant would open for him a credit in London. The defendant wrote in reply:—"You may draw against transmittal of bill of lading at 30s. to 32s. per quarter in advance for your best yellow wheat on our account at 14 days, 1, 2, or 3 months' date, on the Union Bank of London." He afterwards wrote to the defendant, stating that he was about to consign to him 8320 scheffels of wheat shipped by the vessel "Anna," Captain K; and that he annexed duplicate bill of lading. On the same day H. wrote to the Union Bank stating that he had drawn on them six bills of exchange for 400l. each, for account of defendant. The Union Bank having no instructions, sent the letter to plaintiffs. Messrs. B. and C. afterwards presented to the Union Bank for acceptance six bills of exchange for 400l. each drawn and endorsed by H., together with a paper writing purporting to be a bill of lading endorsed by H. in blank. The plaintiffs having sent to the defendant the letter which H. addressed to the Union Bank, the defendant came to the plaintiffs' Bank and had some conversation with the manager respecting the cargo of wheat supposed to have been shipped by H., when defendant said "it was a large amount and that they must only accept against the bill of lading." The defendant then wrote to the plaintiffs as follows:—"We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H., of Wulfgast, for 2400l. against properly endorsed bill of lading of 8320 scheffels of wheat per 'Anna,' F. K. master, on our account." The Union Bank, at the request of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the drafts became due, it was discovered that the bill of lading was forged, and that no cargo was shipped on board the "Anna." H. was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills and debited the plaintiffs with the amount:—Held, that the plaintiffs were entitled to recover the amount from the defendant on an implied contract to indemnify them. *Woods and Others v. Thiedemann*, 478

BANKRUPT.

See HUSBAND AND WIFE.

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- (1). *Composition Deed under "The Bankruptcy Act, 1861," containing Covenant by Creditors to indemnify Debtor against any negotiable Instrument on which he might have incurred Liability.*

A composition deed, under the Bankruptcy Act, 1861, made between a debtor of the one part and his creditors whose names were thereunto subscribed and seals affixed of the other part, contained a clause that each of the

creditors, covenanting for his acts only, should at all times thereafter indemnify the debtor from and against every bill of exchange, promissory note, and other negotiable instrument on which the debtor might have incurred any liability, or which might have been endorsed or put into circulation by any or either of the creditors.—Held, that such a covenant was unreasonable, and therefore the deed was not binding on a creditor who had not executed or assented to it. *Woods v. Foute*, 841

- (2). *Deed of Arrangement for the benefit of such Creditors as shall execute it within a certain specified Time.*

A deed of assignment by a debtor of his estate and effects for the benefit of such creditors as shall execute it within a certain specified time, is not valid within the 192d section of the Bankruptcy Act, 1861, and the certificate of registration of such a deed is no protection to the debtor under the 198th section. *Deane v. Kershaw*, 726

- (3). *Deed of Arrangement between a Debtor and his Creditors, not registered under the 194th section of the Bankruptcy Act, 1861.*

The 194th section of the Bankruptcy Act, 1861, applies not only to deeds which comply with and are framed under the 192d section, but to every deed whatever which is or professes to be, or is obviously on the face of it, intended to be a deed of arrangement between a debtor and the whole body of his creditors.

Every such deed, therefore, which is not registered in the Court of Bankruptcy, under the provisions of the 194th section, is inadmissible in evidence.

A deed of composition purported to be entered into between a debtor and the creditors who executed the deed, and the said creditors (stated therein to be or represent, at the least, three-fourths in value of the creditors), in consideration of the payment of a composition, which the debtor covenanted to pay to them by two instalments on specified days, released their debts. It did not appear whether all the creditors, or what proportion of them in number and value, executed the deed. In an action by one of the executing creditors against the debtor, the deed of composition being offered in evidence by the defendant in support of a plea of release:—Held, that this was a deed intended to be executed by or binding on the whole body of creditors, and that being unregistered it could not be given in evidence. *Hodgson v. Wightman*, 810

- (4). *Assignment by Trader in Insolvent circumstances of his Estate and Effects, with a substantial Exception.*

An assignment, under pressure, by a trader to certain creditors, not of the whole of his property, but with a substantial exception, is not an act of bankruptcy.

Therefore, where a trader, under pressure, assigned to two creditors, who were aware of his insolvency, his household furniture, stock in trade, and goods, chattels, and effects in his dwelling-house, which on their sale realized 193*l.*, and the trader also had book debts and tea in bond of the value of 93*l.*:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the assignment was not an act of bankruptcy. *Smith and Another, Assignees of the Estate and Effects of Wherry, a Bankrupt, v. Timms*, 849

(5). *Prosecution of Adjudication in County Court, where Debts exceed 300*l.**

Where the Registrar of the County Court of the district in which a debtor is in gaol, upon being satisfied that his debts do not exceed 300*l.*, has, under the 101st section of the Bankruptcy Act, 1861, made an order of adjudication in bankruptcy, and directed that it shall be prosecuted in the County Court for the district in which the debtor had resided for the previous six months, the latter Court has jurisdiction notwithstanding it should turn out that the debts in fact exceed 300*l.* *In re Harrison*, 819

BARGAIN AND SALE.

See TRUST.

BILL OF EXCHANGE.

See BANKER.

PROMISSORY NOTE.

VENDOR AND VENDEE, (1).
USURY.

BILL OF SALE.

See WARRANTY.

BROKER.

See SHIPBROKER.

BUILDING SOCIETY.

See PROMISSORY NOTE, (1).

CAPIAS AD SATISFACIENDUM.

See HUSBAND AND WIFE.

CARRIER.

See CONSIGNOR AND CONSIGNEE.

CHARTER-PARTY.

See DEMURRAGE, (1), (2).

Signature by Agent of Charter-Party professing in the body of it to be made between Shipowner and Freightier.

To a declaration on a charter-party, alleging as a breach a refusal by the defendants to load a cargo, the defendants pleaded as an equitable defence that they entered into the charter-party solely as agents for A. D. and Co., and that when the defendants signed the charter-

party it was agreed and understood between the plaintiff and the defendants that the defendants were only to sign the charter as such agents, so as to bind A. D. and Co., and were not to make themselves liable as principals for the performance of the charter: that they signed as follows:—"For A. D. and Co., of Messina, H. and Co., agents,"—the defendants and the plaintiff bona fide believing at the time the charter was made, that the defendants having so signed would not be liable to be sued on the charter, notwithstanding the charter in the body thereof professed to be made between the plaintiff as owner of the one part and the defendants as freighters on the other: that the defendants had power to bind A. D. and Co., and that the plaintiff was inequitably taking advantage of the mistake in drawing the charter:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea showed a good equitable answer to the action.

And per Willes, J.—Semble, that the plea was a good answer at law. *Wake, Executor of T. Wilkinson, v. T. W. Harrop and J. C. Harrop*, 202

COMMON LAW PROCEDURE ACT, 1852.

See WRIT OF SUMMONS, (1), (2).

COMMON LAW PROCEDURE ACT, 1854.

See INSPECTION OF DOCUMENTS.

INTERROGATORIES.

MANDAMUS.

COMMON LAW PROCEDURE ACT, 1860.

See GRANT OF ARMS.

INTERPLEADER, (1).

CONSIGNOR AND CONSIGNEE.

Liability of Master for Misdelivery of Goods of different Weight, shipped by one Consignor for two Consignees, and not identified in the Bill of Lading.

A flour Company abroad shipped on board a vessel, of which the defendant was master, 1676 bags of rye meal, some of which weighed twelve stone each and some eight stone each. They were shipped from lighters, all mixed together, and the master knew nothing of their relative capacity. The master signed two bills of lading, one for 1200 bags and the other for 467 bags, deliverable to order. The latter bill of lading was for 467 bags rye meal, gross 35 tons, 9 cwt., and at the foot of it was "contents unknown and not responsible for weight." The bags were all marked alike, and no means were taken to identify by marks in the bills of lading any particular bags, and there was nothing on the face of the bills of lading from which the master could see that they were intended for different consignees. When the ship arrived the defendant by mistake delivered to

the plaintiff, who was consignee of 467 bags of twelve stone each, several bags which weighed only eight stone.—Held, in the Exchequer Chamber, that the master was responsible for the non-delivery of 467 bags of the proper weight. *Bradley v. Dunipace*, 521

CONTINGENT REMAINDER.

See DEVISE, (2).

CONTRACT.

See VENDOR AND VENDEE, (1), (2).

COPYRIGHT.

Unattested Assignment of a Dramatic Piece after 54 Geo. 3, c. 156, and before 5 & 6 Vict. c. 45.

Held, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that an assignment of copyright made after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, need not be attested. *Cumberland v. Copeland*, 194

COSTS.

See ARBITRATION.

- (1). *Of Examination of Witness about to go Abroad, where Depositions are not used at the Trial.*

The costs of examination upon interrogatories under the 1 Wm. 4, c. 22, of a witness about to go abroad, will not be allowed as costs in the cause where the depositions are rendered useless by the subsequent attendance of the witness at the trial. *Ridley and Others v. Sutton*, 741

- (2). *Meaning of Term "recover" in 13 & 14 Vict. c. 61, s. 11.*

Where a defendant pays money into Court, which the plaintiff accepts in satisfaction of his claim, he "recovers" the amount within the meaning of the 13 & 14 Vict. c. 61, s. 11, which, in certain cases, deprives a plaintiff of costs if he "shall recover a sum not exceeding 20*l.*" *Parr and Another v. Lillierap*, 615

COUNTY COURT.

See BANKRUPT, (5).

PROHIBITION.

CUSTOM.

See SHIPBROKER, (1), (2).

- (1). *Attachment of Debt due from Defendant to third Person in Plaint entered in Lord Mayor's Court of the City of London.*

A custom of the city of London, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties are citizens

or resident in the city, and neither the original debt nor that due from the garnishee accrued within the city, is void in law. *Cox and Others v. The Lord Mayor, Aldermen, and Common Councillors of the City of London*, 338

- (2). *For the Freeman and Citizens of a Town, on a particular Day, to enter on a Close for the purpose of Horse Racing.*

A custom for the freemen and citizens of a town, on a particular day in the year, to enter upon a close, for the purpose of holding horse-racing thereon, is a good custom, and, in pleading it, it is not necessary to aver that the particular day was a seasonable time. *Mounsey v. Iremay*, 729

CUSTOMS, OFFICER OF.

See SUCCESSION DUTY ACT, 1853.

DAMAGES.

Where Apprentice unlawfully quits his Service.

Where there is a contract of apprenticeship by deed, and the apprentice unlawfully quits the service, the master can only recover damages up to the time of action brought, and not prospective damage up to the time when the term of apprenticeship would end. *Lewis v. Peachey*, 518

DEED.

Right to Possession of Title-Deeds as between Tenant for Life and Remainder-Man.

A legal tenant for life has a right to recover from a contingent remainder-man the possession of the title-deeds. *Allwood v. Heywood*, 743

DEED OF SEPARATION.

See EQUITABLE PLEA, (1).

DEMISE.

See LANDLORD AND TENANT.

DEMURRAGE.

- (1). *Meaning of Term "to be loaded in regular turn."*

By charter-party it was agreed between the plaintiff, owner of the ship "Sultan," and the defendant, that the ship should proceed to a certain dock and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered ships to be loaded, and it was their practice to enter ships not only before they were ready to load, but before their arrival at the dock, or even at the port, and if a ship was not ready to load when her turn came the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before it. On the 29th November the plaintiff's ship arrived at the dock, and on the

8th December his agent told the manager that he was ready to load, but several ships which had not arrived and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book, and the loading of the plaintiff's ship did not commence until the 23d of January. The Judge left it to the jury to say what was the meaning of "regular turn," and they found that the plaintiff's ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or known custom, and that "regular turn" was the order of readiness, not the order of entry in the book.—Held, that the defendant was liable for demurrage. *Lawson v. Burness*, 396

(2). *Commencement of Lay Days, where inability to bring Vessel alongside Wharf is occasioned by the ordinary Course of Navigation.*

By charter-party the plaintiff and defendant agreed that the plaintiff's ship, "Bebec" should proceed to Llanelly, and take on board a cargo of culm, and being so loaded should "therewith proceed with all convenient speed to Cole's Wharf, Rochester, or so near thereto as she might safely get, and deliver the same on being paid freight, &c. The regular turn to be allowed for loading, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4*l.* per day." The ship arrived with her cargo at Rochester on the 24th October and was moored at the buoys, about 500 yards from and opposite to Cole's Wharf. On the 25th October the master gave the defendant's agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water for the vessel to come alongside the wharf, and the agent refused to send lighters to receive part of the cargo, so as to lighten the vessel and enable her to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th November, and on the following day she commenced discharging her cargo. In an action for demurrage:—Held, that the master was bound to take the vessel alongside Cole's Wharf, unless prevented by some impediment which endangered her safety, and as the inability to bring the vessel alongside the wharf was occasioned by the ordinary course of navigation the lay days did not commence until the vessel arrived there. *Bastifell v. Lloyd*, 388

DETINUE.

See GRANT OF ARMS.
INJUNCTION.

DEVISE.

(1). *Admissibility of Parol Evidence to explain Ambiguity.*

A testator devised as follows:—"I give and bequeath to my son Edward Fleming all that dwelling-house, &c. (now in the occupation of my son John), during his natural life, and at his death to descend to my grandson Henry Fleming and his heirs for ever." The testator had two grandsons named Henry Fleming, the plaintiff, who was the son of the testator's son Edward, and the defendant who was the son of the testator's son John.—Held, that the proof of that fact raised an ambiguity in the will, as to which of his two grandsons the testator meant, and that parol evidence was admissible to explain it. *Henry Fleming v. Henry Fleming*, 242

(2). *Gift to Testator's "right heirs of the name of H. T., if any such there should be."*

A testator named Henry Thorpe devised his real estate to trustees to permit his son Henry to receive the rents thereof during his life; and after his decease, the testator devised the property to the heirs of the body of his son Henry, and for want of such issue to the testator's nephew Henry for life, and after his death to the testator's "right heirs of the name of Henry Thorpe, if any such there should then be, for ever."—Held, that the ultimate limitation was a contingent remainder which would vest in the person who at the time of the nephew's death filled the character of a right heir of the testator and had the name of Henry Thorpe; but, there being at that time no person who answered both descriptions, the property vested in the testator's heir at law. *William Thorpe and Hannah Pitkin v. Elizabeth Thorpe*, 326

DISCLAIMER.

See LEGACY DUTY, (2).

DISTRESS.

See PLEADING, (1).

DOMICIL.

(1). *Attaché of Foreign Embassy.*

In the year 1818, S., a Portuguese, came to England as agent of a wine Company, in which capacity he was employed until the year 1833. He continued to reside in England, and in the year 1857 was appointed attaché to the Portuguese Embassy, which office he held until his death in 1860. There was no evidence of his having visited Portugal, or communicated with any person there, after he came to England. In a will in his handwriting he stated that as he was a Portuguese subject, and an attaché, his property was not liable to legacy duty. Held:—First, that S. acquired an English domicile. Secondly, that his appointment as attaché did not revive his domicile of origin, and consequently his personal property was liable to legacy duty. *The Attorney-General v. Kent and Others*, 12

(2). *Chief Justice of Ceylon.*

In 1856 R., whose domicile of origin was England, was appointed Chief Justice of Ceylon, during the pleasure of the Crown, and he resided with his family there, in the exercise of the duties of his office, until his death in 1860. He left a library and other effects in England, and he invested large sums of money on mortgage in Ceylon.—Held that, in the absence of any evidence of an intention to acquire a foreign domicile, R. retained his domicile of origin, and therefore his personal property was subject to legacy duty. *The Attorney-General v. Lady Rowe*, 31

EASEMENT.

See WAY.

EJECTMENT.

Right of Claimant to Writ of Possession, when Lease under which he claims has expired at the time of Trial.

A claimant in ejectment is entitled to a writ of possession, notwithstanding the lease under which he claims, though in force at the time the action was commenced, has expired before the time of trial, unless the defendant shows affirmatively that the claimant has no title whatever. *Gibbins v. Buckland*, 736

ENTERTAINMENT.

See REPRESENTMENT.

EQUITABLE PLEA.

See CHARTER-PARTY.

(1). *To Deed of Separation between Husband and Wife.*

To an action by a trustee, on a deed of separation between husband and wife, for non-payment by the husband of the wife's annuity, it is no defence, on equitable grounds, that the husband and wife were induced to live apart by the undue influence, persuasion, and threats of the trustee, who unlawfully harboured the wife; and that, at the time the deed of separation was executed, the wife was pregnant, of which fact she and the trustee kept the husband in ignorance, and thereby induced him to execute the deed; and that he has always been willing to receive back and cohabit with his wife. *Mary Kendall, Executrix of Alfred Kendall, v. Webster*, 440

(2). *In Action of Trespass quare clausum fregit.*

To trespass for entering the plaintiff's close and breaking open a gate and lock with which it was fastened, the defendant pleaded (as a defence on equitable grounds), that a dispute had arisen between the plaintiff and defendant and certain other persons as to whether there was a public highway over the plaintiff's land;

and thereupon, in order that the defendant and the plaintiff's solicitor might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the question, and in consideration that the defendant and the other persons, at the request of the plaintiff, then signed the same, it was, by a memorandum in writing, then signed by the plaintiff, his solicitor, the defendant, and the said other persons, agreed that, without prejudice on either side to the question of right to the said way, it should remain open and unobstructed, for the passage of the defendant and the said other persons, until the plaintiff's solicitor and the defendant should come to a definite understanding as to the course to be pursued in deciding or trying the question then in dispute. The plea then stated that the alleged trespasses were committed before any understanding had been come to, and were the use of the way by the defendant; and, because the gate was wrongfully and contrary to the agreement placed across the way and locked, the defendant broke it open.—Held, that the plea was bad both as an equitable and legal defence.

A plea pleaded as an equitable defence may be sustained as a plea at law if it discloses a good legal defence. *Hyde v. Graham*, 593

ESTOPPEL.

See EVIDENCE, (1).

LANDS CLAUSES CONSOLIDATION ACT, 1845.
PATENT.

EVIDENCE.

See DEVISE, (1).

SHIPBROKER.

[STAMP.]

STATUTE OF FRAUDS, (2).

TRUST.

WARRANTY.

(1). *Rebuttal of Presumption of Seisin in Fee.*

In ejectment by the plaintiff, as administrator of his mother, it appeared that she had been in possession of the land sought to be recovered from the year 1818 until her death, and in order to rebut the presumption of a seisin in fee, the plaintiff, after evidence of the loss of the original, gave secondary evidence of an assignment to his mother of the premises in question for the remainder of a term of ninety-nine years, subject to two lives; but there was no evidence of the creation of the term. It also appeared that the plaintiff had, in his mother's lifetime, mortgaged the premises to a person whose interest vested in the defendant.

Held.—First, that there was evidence for the jury of the existence of a term, and that they might presume that the possession of the plaintiff's mother was referable to that term and not to a seisin in fee.

Secondly, that the plaintiff was not estopped

by his mortgage in his mother's lifetime from setting up the term. *John Metters v. Brown*, 686

(2). *Admissibility of Question as to Reputation of Trustworthiness of Trader on a certain Day.*

In an action for fraudulently representing that a trader was trustworthy, the defendant proposed to ask a witness what was the reputation of the trader on a certain day, as to his trustworthiness.—Held, that the question was admissible: Per Pollock, C. B., and Martin, B.—Bramwell, B., dissentiente. *Sheen v. Bumpstead*, 358

EXECUTION.

See INTERPLEADER, (2), (3).

EXECUTOR.

See GRANT OF ARMS.

GUARANTEE.

MANDAMUS.

PLEADING, (1).

FACTOR.

See STATUTE OF FRAUDS, (2).

[FALSA DEMONSTRATIO.

General and particular Description.

A conveyance by deed of all that messuage, with the lands, &c., belonging, late in the occupation of B., and which house, lands, &c., are called by the names following (naming the greater part, but not all, of the closes whereof B.'s farm consisted), was held to pass the closes expressly named only, and not the residue also. *Griffiths v. Penson*, 862]

FEME COVERT.

See HUSBAND AND WIFE.

FRAUD.

See PRACTICE, (3).

VENDOR AND VENDEE, (1).

FRAUDULENT REPRESENTATION.

See EVIDENCE, (2).

FRIENDLY SOCIETY.

See PROHIBITION.

GARDEN-RENT.

See RENT.

GARNISHMENT.

See CUSTOM, (1).

GRANT OF ARMS.

Right of Persons entitled in Remainder to maintain Detinue against Devisee for Life.

A. obtained from the Heralds' College a

grant of arms, to be borne by him and the descendants of his brother. His brother had two sons, the elder of whom was heir at law of A., and the younger his executor with another person. A. devised all his household goods and effects to his wife, and she took possession of the grant of arms.—Held, that the two nephews of A. had not such an exclusive interest in the grant of arms as to enable them to maintain an action of detinue for it against the wife of A.

Semble, that even if the executors were entitled to the grant of arms, the Court could not amend the writ, under the 19th section of the Common Law Procedure Act, 1860, so as to give judgment for the one plaintiff who was executor, since the other executor ought to have been joined. *John Stubs and Peter Stubs v. Elisabeth Stubs*, 257

GROUND-RENT.

See RENT.

GUARANTEE.

Liability of Executor of Guarantor for Goods supplied after his Death.

Guarantee as follows:—"I request you will give credit in the usual way of your business to L., and in consideration of your doing so I hereby engage to guaranty the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100*l.* sterling."—Held, that the guarantee was not a bare authority, but a contract, and therefore the executor of the guarantor was liable for goods supplied after his death. *Bradbury and Others v. Morgan and Another, Executors of Joseph Manuel Leigh, deceased*, 249

HERALDS' COLLEGE.

See GRANT OF ARMS.

HORSE RACING.

See CUSTOM, (2).

HUSBAND AND WIFE.

See EQUITABLE PLEA, (1).

Discharge of Married Woman in Custody under ca. sa.

The Court will not discharge a married woman in custody under a *ca. sa.* issued on a judgment obtained against her whilst sole, if it appear that she has property settled to her separate use.

Where, in such a case, the husband has obtained an order in bankruptcy for his discharge, the Court will not interfere on motion, but will allow a writ of *audita querela* to issue. *Ex parte Butler, In re Jay, v. Mary Amphlett*, 637

INFORMATION.

Time, under 11 & 12 Vict. c. 43, s. 11, for laying Information, under 5 Geo. 4, c. 83, s. 4, for deserting Wife and Child.

To constitute an offence under the 5 Geo. 4, c. 83, s. 4, there must be a running away and deserting a wife or child, and a chargeability to a parish by reason of it. Therefore it is sufficient, under the 11 & 12 Vict. c. 43, s. 11, if the information is laid within six months of the chargeability, although the running away took place more than six months before the information was laid. Per Pollock, C. B., and Martin, B.—*Dissentiente Bramwell, B*
Reeve v. Yeates, 435

INJUNCTION.

To restrain Sale of Photographs.

The plaintiff lent some photograph portraits to a person who became insolvent, and his assignees having offered the photographs for sale by auction, the defendant purchased them, and by photographically printing from negatives he obtained reduced copies which he published and sold. The plaintiff brought an action against him and recovered nominal damages on a count for the infringement of the plaintiff's right:—Held, that the plaintiff was entitled to a writ of injunction to restrain the defendant from taking or selling any more copies of the photographs, and also to recover them or their value under a count in detinue. *Mayall v. Higbey,* 148

INSOLVENT DEBTOR.

Agreement not to oppose Final Order for Protection.

The defendant having petitioned the Court for the relief of insolvent debtors, his discharge was opposed by the plaintiff. An agreement was entered into between them, that the defendant should give the plaintiff a promissory note as a security for his debt, and that the plaintiff in consideration thereof should not oppose the making of a final order for protection. This arrangement was sanctioned by the Commissioner of the Court, who adjourned the final hearing to allow of its being effected. The promissory note was accordingly given, the opposition withdrawn, and the final order for protection made.—Held, that the agreement was illegal as against the policy of the law, and that the promissory note given in pursuance of it was therefore void. *Humphreys v. Welling,* 7

INSPECTION OF DOCUMENTS.

Power of Court or Judge to order Director of Joint Stock Company to allow Inspection of Documents in his Possession.

In an action against a joint stock Company, the Court or a Judge has power, under the 14

& 15 Vict. c. 99, s. 6, and the 17 & 18 Vict. c. 125, s. 50, to order a director of the Company to allow inspection of their documents in his possession.

An affidavit of a director, in answer to an attachment for disobedience of such an order, stated that he had not on the day the order was made, or at any time since, the documents in his possession, custody, or power, and that ever since the order was made it had been out of his power to comply with it:—Held, that the affidavit was insufficient; and the Court ordered the director to be examined *viva voce* before a Master, under the provisions of the 46th section of the Common Law Procedure Act, 1854. *Lacharme v. The Quartz Rock Mariposa Gold Mining Company,* 134

INSURANCE (MARINE).

(1). *Amount which Assured is entitled to recover where several Policies are effected upon the same Ship, valued differently.*

Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss, the assured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy.

Therefore where a shipowner effected upon the same ship four policies of insurance, in which respectively the agreed value of the ship was stated to be 3000*l.*, 3000*l.*, 5000*l.*, and 3200*l.*, and upon a total loss received under the three former policies sums amounting to 3126*l.* 13*s.* 6*d.*, and then sued upon the latter policy:—Held, that, as between the assured and the underwriter of that policy, the value of the ship must be taken to be 3200*l.*, and the assured was only entitled to recover the difference between that sum and 3126*l.* 13*s.* 6*d.* *Bruce v. Jones,* 769

(2). *Agreement to refer Adjustment of Claims to professional Average-stater—Adjustment condition precedent to right of action.*

A policy of assurance, in a Mutual Marine Insurance Association, was subject to the following rule:—"All average claims and claims of abandonment shall be adjusted and settled, conformably to the custom of Lloyd's or the Royal Exchange, by a professional average-stater. But should the committee or the assured be dissatisfied with the adjustment, they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of such two persons shall be final; and all other cases of dispute, of whatever nature, shall be referred in like manner; but the committee or assured by mutual consent may refer all such adjustments or disputes to one person only, whose award shall

also be final; and no action at law shall be brought until the arbitrators have given their decision."—Held, that no action could be maintained on the policy for a total loss until the claim had been adjusted and settled by arbitration in pursuance of the rule.

In an action for a total loss the declaration set out the policy and the above rule, and averred that the plaintiff had always been willing that the loss and amount payable in respect thereof should be adjusted and settled according to the rule, and that he had performed all conditions precedent necessary to entitle him to maintain the action. It then alleged, as breaches, that the defendant would not settle or adjust, or allow to be settled or adjusted, the amount payable on the loss, in accordance with the policy and rules, and that the amount insured had not been paid. The defendant demurred to the declaration and also pleaded a plea which in terms traversed the breaches.—Held, that the declaration was good on demurrer, since it must be deemed to be averred either that the defendant had refused to refer, or that a reference had been had and an award made in favour of the plaintiff, as for a total loss; but that the plea, being proved, was an answer to it. *Tredwen v. Holman*, 72

INTEREST.

See STATUTE OF LIMITATIONS, (2).

INTERPLEADER.

- (1). *Where one of the Parties has incurred to another a personal Obligation, and the Claims are not identical.*

A Court of law is not bound by the principles which govern Courts of equity upon a bill of interpleader, and may give relief although one of the parties has incurred to another a personal obligation independently of the question of property, and the claims are not identical.

The defendant, an auctioneer, sold for the plaintiff some furniture and paid him a part of the proceeds; but whilst the balance was in his hands G. gave him notice that the furniture belonged to her. The plaintiff having brought an action against the defendant for the balance, he sought to deduct his charges for commission, &c., and applied for an interpleader order between the plaintiff and G. as to the residue; G. being willing to allow the defendant his charges.—Held, that a Judge had power to make the interpleader order, if not under the 1 & 2 Wm. 4, c. 58, under the 12th section of the Common Law Procedure Act, 1860. *Best v. Hayes*.—*Jane Gallagher, Claimant*, 718

- (2). *Damage by Sale, under Interpleader Order, of Goods wrongfully taken in Execution.*

An execution-creditor is not liable to the person whose goods have been wrongfully taken in execution for any damage sustained by him in consequence of their sale under an

interpleader order. *Walker v. Olding and Others*, 621

- (3). *Execution-Creditor becoming Party to Interpleader Order, no adoption of act of Sheriff.*

An execution-creditor does not, by becoming a party to an interpleader issue, ratify or adopt the act of the sheriff, so as to render himself liable in trespass for the seizure of the goods, which are the subject of the interpleader issue. *Woollen v. Wright*, 554

INTERROGATORIES.

See COSTS, (1).

Answer by Defendant, where Interrogatories relate as much to Plaintiff's Case as Defendant's.

Where interrogatories, administered under the Common Law Procedure Act, 1854, relate as much to the plaintiff's case as the defendant's, the latter is bound to answer them, although the answers may disprove his case. *Bayley v. Griffiths*, 429

JOINT STOCK COMPANY.

See INSPECTION OF DOCUMENTS. PRACTICE, (3).

JUDGMENT.

See PLEADING, (3). PRACTICE, (2).

LANDLORD AND TENANT.

See LESSOR AND LESSEE.

Demise for Three Years determinable on a Six Months' Notice to Quit, otherwise to continue from Year to Year until the Term shall cease by Notice to Quit at the usual Time.

A demise for "a term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice; and if not determined, a subsisting tenancy from year to year. *Jones v. Nixon*, 48

LANDS CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 VICT. c. 18.)

Estoppel by Verdict and Judgment on Sheriff's Inquisition.

The verdict and judgment upon an inquisition under the compensation clauses of the Lands Clauses Consolidation Act, 1845, do not estop the Company, in an action upon the judgment, from denying that the lands in respect of which the damage has been assessed, and the plaintiff's interest therein, were damaged and injuriously affected by their works.

But where the damages claimed and awarded exceed 50*l.* the Company are estopped from denying that the claimant is entitled to compensation to an amount exceeding 50*l.* *Read v. The Victoria Station and Pimlico Railway Company*, 826

LEGACY DUTY.

See DOMICIL, (1), (2).

- (1). *Devise to Testator's Nieces of Land, to enure to Testator's Nephew on Transfer of a certain Sum to Trustees.*

A testator died in 1811 having devised lands to his nieces as tenants in common in fee, with a proviso, that if his nephew should transfer 10,000*l.* consols into the names of trustees for the benefit of the nieces the lands should enure to the use of his nephew. The nephew having, in the following year, exercised his option and transferred the consols:—Held, that the defendant, the executor of the last surviving trustee, was liable to pay duty on the 10,000*l.* consols, at the rate of 2½ per cent. as fixed by 48 Geo. 3, c. 149. *The Attorney-General v. Wyndham*, 563

- (2). *General Residuary Bequest operating as the Exercise of a General Power of Appointment.*

In the absence of a contrary intention apparent on the face of a will, a general residuary bequest operates as an exercise of a general power of appointment, of which the testator is the donee, although the residuary legatees are the persons who would be entitled, in default of appointment, under the instrument creating the power.

If in such case the testator has in the first instance charged his residuary estate with the payment of debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment, and elect to take under the gift to them in the original instrument.

Quære, whether the disclaimer by an appointee operates to vest the fund appointed in the persons entitled in default of appointment?

A. by will bequeathed his residuary personal estate, on the death of his daughter B, unmarried, to trustees, for such purposes as she should by will appoint, and in default of appointment in trust for his brother C. and his sister D. B. died unmarried, having bequeathed her residuary estate (subject to the payment of debts, funeral and testamentary expenses, legacies and annuities) to her uncle C. and her aunt D.:—Held, that B.'s will operated as an exercise of her power of appointment, and that C. and D. were liable to pay duty on the fund appointed at the rate of 5 per cent. and not 3 per cent., the rate at which they would have been liable if they could have taken directly under A.'s will. *The Attorney-General v. Brackenbury and Another*, 782

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

- (1). *Implied Grant.*

In 1855, S., the owner in fee of two mills, leased one to P., who carried on therein the business of a bleacher. The refuse from his works was discharged through a drain, partly open and partly covered, into a natural stream or watercourse, 300 or 400 yards distant, and upon which the other mill was situate. This discharge of the refuse took place about seven times a fortnight and polluted the stream. In 1858, P. surrendered his lease, and S. granted a new lease to the defendant. In this lease the defendant was described as a "bleacher," and the demise was of the premises "late in the occupation of P." There was a clause that all buildings erected by the defendant for the purpose of bleaching should, at the end of the term, become the property of S. In 1858 the plaintiff purchased both mills. The defendant discharged the refuse from his works through the drain into the stream in the same manner that P. had formerly done. The plaintiff, who carried on in the other mill the business of a paper maker, brought an action against the defendant for polluting the stream.—Held, that the lease might be explained by the state of the premises at the time it was granted, and the mode in which they had been previously enjoyed; and that, thus explained, there was an implied grant by S. to the defendant to use the stream for the purpose of his business of bleaching, and therefore the plaintiff, who was in the position of S., could maintain no action against the defendant. *Hall v. Lund*, 676

- (2). *Covenant by Lessee not to assign demised Premises without Consent in Writing of Lessor.—Assignment by Lessee of all his Property for Benefit of Creditors under section 192 of the Bankruptcy Act, 1861.*

A lessee, who covenanted not to assign the demised premises without the consent in writing of the lessor, executed a deed, under the 192d section of the Bankruptcy Act, 1861, whereby he assigned all his property to trustees for the benefit of his creditors.—Held, that the assignment was a forfeiture of the lease. *Holland v. Cole*, 67

- (3). *The General Words "belonging or appertaining" to the demised Premises not sufficient to pass a Stable.*

In 1766, P., the owner in fee, demised to B. a plot of ground for ninety-seven years and a quarter from the 25th of December, 1765. The trustees of B. demised to S. for ninety-six years, from Lady Day, 1765, a part of the ground upon which a house, called No. 7, Cumberland Street, and a stable, were built; and they also demised to E. for eighty-nine years, from Lady Day 1771, another part of the ground upon which a house, called No. 4,

Hyde Park Place, was built. In 1795 R., being the owner of the leases of both houses, assigned the lease of No. 7, Great Cumberland Street to G., reserving the stable, and from that period it was always occupied with No. 4, Hyde Park Place. In 1823 the defendant, who had acquired the interest of R. in the lease of No. 4, Hyde Park Place, and who was in actual occupation of it together with the stable (to which he had made a direct communication by a door from the house), obtained from the owner of the reversion of the plot of ground, demised in 1766, a reversionary lease of No. 4, Hyde Park Place, for ninety-nine years from the 25th of March, 1822. The house was described in this lease by metes and bounds and by reference to a plan in the margin, neither of which included the stable, but the lease contained the following words, which were not contained in the lease of the 23d of December, 1774:—"Together with all out-houses, edifices, buildings, stables, yards, gardens, ways, watercourses, lights, areas, vaults, cellars, easements, profits, and commodities whatsoever to the said premises hereby demised belonging or appertaining." There was also a covenant to deliver up at the end of the term "racks, mangers, stalls," &c. In 1840, the owner of the reversion of the plot of ground demised in 1766 granted to D. a reversionary lease of No. 7, Great Cumberland Street, for fifty years by the following description:—"Together with the capital messuage or tenement, coach-house and stable, erected and built thereon, &c., and which said messuage (but not the stable) is now in the possession of D.," and which said stable is now in the possession of M. (the defendant). On the expiration of the lease of the 23d of December, 1774, the plaintiff, to whom the reversionary lease of No. 7, Great Cumberland Street had been assigned, brought ejectment to recover possession of the stable.—Held, that the stable did not pass to the defendant under the general words in the reversionary lease of 1774, as "belonging or appertaining" to the demised premises. *Maitland and Others v. Mackinnon*, 607

LIBEL.

See SLANDER.

LIS PENDENS.

See ASSAULT.

Local Government Act, 1858 (21 & 22 Vict. c. 98).—Invalid By-law by Local Board.

The 34th section of the Local Government Act, 1858 (21 & 22 Vict. c. 98), empowers every local Board to make by-laws "with respect to the level, width, and construction of new streets; and to provide for the observance of the same by enacting therein such provisions as they think necessary as to the power of the local Board to remove, alter, or pull down any

work begun or done in contravention of such by-laws." By section 35, "when any house or building has been taken down in order to be rebuilt or altered, the local Board may prescribe the line in which any house or building to be thereafter built shall be erected, and the same shall be erected in accordance therewith; and the local Board shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back."

A local Board made a by-law which provided that "if any owner or person should construct or cause to be constructed any works, or do any act, or omit to do any act, or comply with any requirements of the local Board, or should make any alterations in any works after they have been completed, whether in new or existing buildings, contrary to the provisions therein contained, the local Board might cause such works to be removed, altered, or pulled down."—Held, that the by-law was invalid as exceeding the powers conferred by the Act. *Brown and Others v. The Local Board of Health of Holyhead*, 601

LONDON (CITY OF).

See CUSTOM.

MANDAMUS.

To compel Payment of "Agreed Salary" out of Rates.

A claim to a writ of mandamus under the 68th section of the Common Law Procedure Act, 1854, cannot be sustained if there is any other equally effectual remedy.

In an action by executors against the clerk of Commissioners for putting into execution a Town Improvement Act (2 & 3 Vict. c. lxiii.), and in which action the plaintiffs claimed a writ of mandamus under the 68th section of the Common Law Procedure Act, 1854, the declaration stated that the Commissioners were indebted to the testator for the "agreed salary" payable by them to him for services rendered by him as clerk to the Commissioners; and also for other work by him "as the attorney of and otherwise for" the Commissioners in and about the business of the Commissioners. The declaration then alleged "that the said debts became and were a charge on any moneys which might be in the hands of the Commissioners, and which should have been collected by them under and by virtue of the said Act;" and if the Commissioners should not have in their hands any moneys sufficient to pay the said debts," then such debts became a charge and were chargeable on a rate leviable and to be levied by the Commissioners under the Act." The defendants pleaded to so much of the debts as became due on simple contract, the Statute of Limitations, and to the

debts, except the agreed salary, that no signed bill was delivered: also that the Commissioners had no funds whereout they could pay the debts.—Held: First, that the declaration was bad, inasmuch as assuming that the services in respect of which the "agreed salary" was claimed were payable out of the rates, the others might be services for which the Commissioners were personally liable, and consequently the remedy was by action, not by claim of mandamus.

Secondly, that on the same principle the two first pleas were good.

Semble, that the last plea was also good.
Sarah Bush and Another v. Beavan, 500

MARKET.

(1). *Sale by Sample on Market-day near to but without Limits of Market.*

A sale by sample, on a market-day, near to but without the limits of the market, is not a disturbance of the market, unless it is done designedly and with the intention to evade payment of toll *The Mayor, Aldermen, and Burgesses of the Borough of Brecon v. Edwards*, 51

(2). *Liability for Stallage.*

Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil.

Therefore where a person used a market with a chair and a "ped," that is, a wooden or wicker basket four feet long, two feet and a half wide, and two feet high, with a lid which, being turned back and supported by pieces of wood *not fixed in the soil*, formed a table on which he exposed his provisions for sale:—Held, that he was liable for stallage. *The Mayor, Aldermen, and Burgesses of Great Yarmouth v. Martha Groom. The Same v. Daniel*, 102

MASTER AND SERVANT.

Liability of Master for Injury caused by reckless Driving of his Servant in the course of his Employment.

The driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. In an action against the defendants, the driver of their omnibus said that he pulled across the plaintiff's omnibus to prevent it passing him. The defendants had given instructions to their driver not to obstruct any omnibus. The Judge directed the jury that a master was responsible for the reckless and improper conduct of his servant in the course of the service: that if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the in-

terest of the defendants, then they were responsible: that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the act of the defendants' servant was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.—Held, in the Exchequer Chamber, that the direction was right: *Wightman, J.*, dissentiente. *Limpus v. London General Omnibus Company*, 528

MEMORANDA, 210, 562, 857.

MERCANTILE LAW AMENDMENT ACT, 1856.

See STATUTE OF LIMITATIONS, (1).

MERCHANT SHIPPING ACT, 1854.

See SALVAGE, WARRANTY.

MINE.

See RAILWAY COMPANY.

MISJOINDER.

See PLEADING, (1).

MONEY HAD AND RECEIVED.

See SALVAGE.

MORTGAGE.

See EVIDENCE, (1).

NEGLIGENCE.

Injury through Walking in dark Passage, where no Obligation to Light it.

The plaintiff, a carman, was sent by his employer to the defendant's premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase and was seriously injured.—Held, that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. *Wilkinson v. Fairrie and Another*, 633

NOTICE TO DECLARE.

See PRACTICE, (2).

NOTICE OF TRIAL.

See PRACTICE, (4).

NOTICE TO QUIT.

See LANDLORD AND TENANT.

NUISANCE.

See LESSOR AND LESSEE, (1).

PARTICULARS.

See PRACTICE, (3).

PATENT.

Award of Arbitrator no Estoppel in Action between the same Parties for another Infringement of same Patent.

Proceedings in Chancery for the infringement of a patent, the validity of which was in question, were referred to an arbitrator, who awarded that the patent was not illegal and void:—Held, that in an action between the same parties for another infringement, the defendant was not estopped from disputing the validity of the patent. *Newall v. Elliot and Another*, 797

PAYMENT.

See STATUTE OF LIMITATIONS, (2).

PAYMENT OF MONEY INTO COURT.

See COSTS, (2).

PLEADING, (2).

Remittance of Debt by Bank Bill, without Costs demanded by Attorney.

The plaintiffs' attorney wrote to the defendant requesting him to remit a balance due to the plaintiffs, with 13s. 4d. costs. The defendant sent a bank bill for the amount of the balance only. The plaintiffs' attorney wrote in answer that he would not receive the bank bill, unless the 13s. 4d. was paid, but did not return it. The jury having found that any objection to the remittance not being in money was waived, and that the bank bill was only refused because it did not include the costs:—Held, that there was evidence of payment *Caine and Another v. Coulton*, 764

PED.

See MARKET, (2).

PENALTY.

See ASSESSED TAXES.

PHOTOGRAPHS.

See INJUNCTION.

PLEADING.

See ASSAULT.

CUSTOM.

INSURANCE (MARINE).

LANDS CLAUSES CONSOLIDATION ACT, 1845.

MANDAMUS.

TRESPASS.

(1). *Misjoinder of Counts.*

After counts by the plaintiff, as executor, for an excessive distress and for distraining for more rent than was due, the declaration proceeded thus:—"And the plaintiff as such executor as aforesaid, also sues the defendant for money paid by the plaintiff as such executor as aforesaid, for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff as such executor as aforesaid claims 50*l.*"—Held, on demurrer, that the declaration was bad for misjoinder. *Davies, Executor of Elizabeth Davies, v. Davies*, 451

(2). *Payment of Money into Court.*

Where, in an action of trespass by one tenant in common against another, the declaration alleges a destruction of and expulsion from the entire common property, the defendant may pay money into Court in respect of the damage to the plaintiff's share, and as to the residue plead liberum tenementum, and that it was not the plaintiff's. *Cresswell v. Hedges*, 421

(3). *Replication to Plea of Matter of Defence arising after last Pleading.*

Where a defendant pleads a matter of defence which in fact arose after the last pleading, the plaintiff may, under 23 Reg. Gen. T. 1853, confess the plea and sign judgment for his costs, although it contains no allegation that the matter of defence arose after the last pleading. *Honarth v. Brown*, 694

POLICY OF INSURANCE.

See INSURANCE (MARINE).

POWER.

See LEGACY DUTY.

PRACTICE.

See ATTORNEY.

HUSBAND AND WIFE.

(1). *Time to Declare after Appearance.*

Neither the Common Law Procedure Act, 1852, nor the rules of Hilary Term, 1853, have altered the previous practice by which a plaintiff had the whole of the term next after appearance, whether in term or vacation, to declare.

Notice to declare may be given either in term or vacation.

An action was brought against the drawer, and also against the acceptor of a bill of exchange. In Trinity Vacation, a Judge ordered that the defendant in the action against the drawer be bound by the result of the verdict in the action against the acceptor. That action stood for trial in the following Michaelmas Term, when, by consent, a stet processus was

entered. In Michaelmas Vacation, the defendant in the action against the drawer served the plaintiff with a notice to declare in four days, and, he not having done so, the defendant in the following term signed judgment.—Held, that the judgment was irregular, inasmuch as the plaintiff had the whole of that term to declare. *Medway v. Gilbert*, 496

(2). *Non Pros.*—By one of several Defendants.

Where a writ of summons has issued against several defendants, who enter a joint appearance, and the plaintiff declares against some of them only, the others may, after notice to declare, sign judgment of non pros as against themselves. *Bancroft v. Greenwood, Hyde, and Ohadderton*, 778

(3). *Particulars under Plea of Fraud.*

To an action, commenced by a Joint Stock Company and continued by the official manager under the Winding-up Acts, for calls on shares held by the defendant in the Company, he pleaded that he was induced to become the holder of the shares by fraud, and within a reasonable time after he had notice of the fraud, and before he received any benefit from the contract, he repudiated it.—Held, that the plaintiff was entitled to particulars of the acts of fraud and repudiation. *M'Craith, Official Manager of the State Fire Insurance Company, v. Stevens*, 454

(4). *Countermand of Notice of Trial.*

Where notice of trial has been given for a particular Sittings, and at the request of the defendant the cause is made a remanet to a subsequent Sittings, a countermand of trial by notice four days before, such subsequent Sittings is sufficient. *Sully v. Noble and Another*, 809

PROBATE DUTY.

In respect of Interest accrued between Time of Death of Intestate and Grant of Administration.

Probate duty is payable in respect of interest which has accrued between the time of the death of an intestate and the grant of administration, whether such interest is due by contract or recoverable in the nature of damage.

In 1819 S., a widow, died intestate, and the Solicitor of the Treasury took out administration to her estate, and received under it 23,821*l*. In 1823 I. C., the wife of E. C., applied to the Crown, claiming to be next of kin of S., but died in 1825 without establishing her claim. In 1830 E. C. died intestate without having taken any steps to recover the money, and without having administered to his wife. In 1855 administration to the estate of I. C. and the estate of E. C., on behalf of their children, was granted to P., who instituted a suit in equity to administer the estate of S., when it

was found that I. C. was the sole next of kin of S., and it was ordered that the Solicitor of the Treasury pay to P., as the representative of I. C., the money in his hands with interest at 4*l*. per cent., which amounted to 34,124*l*.—Held: First, that probate duty was payable upon the value of the estate of I. C., as increased by the interest, at the time administration was granted.

Secondly, that no probate duty was payable in respect of the estate of E. C. *The Attorney-General v. Partington*, 157

PROCESS SERVER.

See WRIT OF SUMMONS, (2).

PROHIBITION.

Defendant disentitled to Writ by delay.

Upon the hearing of a plaint in a County Court on the 11th of September, an objection to the jurisdiction was overruled and judgment given for the plaintiff. On the 20th of September notice was given of the defendants' intention to apply for a writ of prohibition. On the 10th of October the debt and costs were paid to the Registrar to prevent an execution, and on the same day a summons was taken out at Chambers, returnable on the 14th, calling on the County Court judge and the plaintiff to show cause why a writ of prohibition should not issue. On the 13th it was served. On the 16th the Registrar paid over the debt and costs to the plaintiff's attorney.—Held, that the defendants' delay had disentitled them to a writ of prohibition.

Quare, whether in prohibition the Court will award restitution? *Semble*, per Martin, B., not, when the subject-matter of the suit is no longer within the control of the inferior Court.

Semble, that where a dispute has arisen between a member and the trustees of a Friendly Society, for the decision of which a specific tribunal is provided by the rules of the Society, the jurisdiction of the County Court is ousted. *In re a Plaintiff in the County Court of Yorkshire, between Charles Denton, Plaintiff, and James Marshall and Others, Defendants*, 854

PROMISSORY NOTE.

See BILL OF EXCHANGE.

INSOLVENT DEBTOR.

STATUTE OF LIMITATIONS, (1), (3).

(1). *Liability of Secretary of Building Society on Note signed by him.*

The defendant, the secretary of a benefit building society, signed a promissory note in the following form:—"Midland Counties Building Society, No. 3. Birmingham, 1st Sept. 1856. One month after demand, we jointly and severally promise to pay J. B. the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds

per cent. per annum (payable half-yearly), for value received, W. H., S. B., Directors. W. F., Secretary:—Held, that the defendant was personally liable on the note. *Bottomley v. Fisher*, 211

(2). *Joint and several Promise to pay three Persons on their Order, or the major Part of them.*

Document as follows:—"On demand, we jointly and severally promise to pay to Messrs. W., S, and M., or to their order, or the major part of them, the sum of 100*l*."—Held, a valid promissory note, upon which the three payees might maintain an action. *Watson, Southern, and Mayer v. George Evans*, 662

RAILWAY CLAUSES CONSOLIDATION ACT, 1845.

See RAILWAY COMPANY.

RAILWAY COMPANY.

Liability for Damage to Mine under Railway, caused by Neglect to repair Drains.

The plaintiffs were owners and occupiers of a coal-mine which, as well as the surface land, formerly belonged to the same owner. A railway Company, to whose rights and obligations the defendants succeeded, purchased under the powers of their Act of Parliament, the surface land for the purpose of their railway, and constructed it thereon. The Company cut and removed upwards of twenty feet in thickness of the surface soil over the plaintiffs' mine to get the level at which they laid their rails. This soil was clay impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the Company along the length of their line to a lower district of country, through which a brook flowed. The railway was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, but was an impediment to the passage of water in large floods. The Company were required by their Act of Parliament to make and maintain sufficient drains. At the time the railway was made the plaintiffs' mine was not worked within forty yards of it; and drains were made at the side of the railway sufficient to carry off the water. Subsequently the plaintiffs gave the defendants notice of their intention to work the mine under the railway. The defendants having declined to purchase the mine the plaintiffs worked under it, when, from no fault or negligence of theirs, but as the natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendants threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. In the year 1860, a flood

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happened, and the water, part of which would have escaped but for the bridge, flowed down the railway, and in consequence of the high ground between the brook and the surface over the mine being removed it reached that spot, and, together with the water falling there and the springs arising in the cutting, penetrated into the mine for want of efficient drains.—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendants were liable in an action for the damage sustained by the plaintiffs, and that the claim was not one which could have been enforced under the compensation clauses of the Railway Clauses Consolidation Act, 1845. *Bag-nall and Another v. The London and North Western Railway Company*, 544

REFRESHMENT.

House for Public Refreshment, Resort, and Entertainment, within 23 & 24 Vict. c. 27.

On an information under the 23 & 24 Vict. c. 27, for keeping a house "for public refreshment, resort, and entertainment," the evidence was that the defendants kept a dancing saloon. The entrance from the street led to a room fitted with chairs, looking-glasses, and a number of shelves holding glasses, measures, and pots. This room opened into the dancing-room. When the house was visited by the police, one of the defendants was behind a counter at the entrance of the dancing-room pouring beer from one jug into another. A number of persons were in the room, some dancing, some drinking beer; men were sitting at a table, drinking and singing; and there were a number of quarts of beer in persons' hands, from which glasses were filled and handed to others. No sale of anything was seen. Threepence was charged for admission, and if a pot of beer was wanted, the persons paid sixpence first and one of the defendants went for it. The magistrate, before whom the information was laid, was of opinion that there was no sufficient evidence that it was a house kept open for "public refreshment and entertainment," conceiving that the word "entertainment" meant not diversion or amusement, but the provision of food, drink, and whatever might be reasonably required for the personal comfort of guests.—Held, that the finding of the magistrate was conclusive: *Per totam Curiam*.

That the magistrate's construction of the word entertainment was correct: *Per Pollock, C. B.* That the evidence was sufficient to support a conviction: *Per Martin, B.* That the decision of the magistrate was correct in law and fact: *Per Bramwell, B. Taffor, Appellant, and Oran and Another, Respondents*, 370

REMAINDER-MAN.

See DEED.

RENT.

Freehold Ground-Rent—Garden-Rent.

The defendant put up for sale by public auction certain property described in the particulars as follows:—"Four freehold ground-rents of 19l. 4s. each, viz., 15l. ground-rent and 4l. 4s. garden-rent, amounting to 76l. 16s. a year arising from four capital residences of the annual value of 384l., held by four leases granted to W. Reynolds for a term of ninety-five years each (wanting ten days) from the 29th of September, 1844, with reversion to the property in about eighty years." The plaintiff became the purchaser and paid the defendant 232l. as a deposit in part payment of the purchase-money. The vendors in making out their title produced four counterparts of leases granted by one Roy to Reynolds. By each of these leases, Roy, in consideration of the yearly rents thereafter reserved, demised to Reynolds a piece of land with a messuage thereon for the term of ninety-five years (wanting ten days), at the yearly rent of 15l.; and for the consideration aforesaid, and also in consideration of the further rent thereafter reserved and of the tenants of Reynolds, Roy covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the said term, to enter upon and use and enjoy as a pleasure-ground or garden a piece of land particularly described, jointly with Roy; and Roy covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay Roy the yearly rent of 15l., and also the further yearly rent of 4l. 4s. in respect of the right of user of the garden or pleasure-ground, such rent to be payable in the same manner as the rent of 15l. By the 10th condition it was provided, that if any mistake be made in the description of the property, or any error or misstatement whatsoever shall appear in the particulars, such mistake, error, or misstatement shall not vitiate or annul the sale, but a compensation or equivalent shall be given or taken as the case may require, to be settled by two referees or their umpire.

Held, that the annual sum of 4l. 4s. was not a freehold ground-rent, but merely a sum in gross payable under a covenant, and consequently the plaintiff was entitled to rescind the contract and recover back the deposit.

Semble, that the 10th condition did not apply to such a case. *Evans and Others v. Robins*,

302

RENT-CHARGE.

Annuity to Servant hired at weekly Wages provided she should be in his Service at the time of his Decease.

A testator charged his real estate with payment of an annuity to a servant, hired at

yearly wages, provided she should be in his service at the time of his decease. Two days before his death the testator wrongfully dismissed her without notice, and she left his house.—Held, that she was not entitled to the annuity. *Darlow v. Edwards, Snow, and Sarah his Wife*,

547

SALE.

See VENDOR AND VENDEE, (1), (2).

SALVAGE.

Action by Seaman to recover his Share of Salvage awarded by Justices.

No action at law can be maintained by a seaman for his share of salvage awarded by two justices, under the 17 & 18 Vict. c. 104, s. 460, and paid to the owner of the salvor vessel.

The owner of a vessel, to whom the aggregate amount of salvage had been paid, offered a seaman less than he claimed as his share, which the seaman refused:—Held, no evidence of money received to the seaman's use, or of an account stated. *Atkinson v. Woodhall*, 170

SHERIFF.

Expenses of Advertising a Sale by Auction of Execution Debtor's Effects.

A sheriff is not entitled to deduct the expenses of advertising a sale by public auction of the execution-debtor's effects, seized under a writ of *fi. fa.*, although the debt or damages exceed 50l., and the 24 & 25 Vict. c. 154, s. 74, renders it imperative on the sheriff in such case to advertise and sell by auction. *Braithwaite v. Marriott*,

591

SHIP.

See WARRANTY.

SHIPBROKER.

Custom for an "Introducing Broker" to receive renewed Commission on every Renewal of a Charter effected through him.

(1). The defendants, who were shipbrokers, being employed by an agent of the French Government to procure for them the charter of two ships, L., who was also a shipbroker, informed the defendants of two ships, called the "New York" and the "Glasgow," which might be chartered. After some negotiation and correspondence between L., the defendants, and the owners of the ships, the "New York" was chartered for six months, and the defendants wrote to L. stating, that "in consideration of his having assisted them in procuring the charter of the "New York," they engaged to pay him a commission of two and a half per cent. The "Glasgow" was afterwards chartered, and the charter of the "New York" was renewed for another six months, and L. then

claimed commission at the same rate on the charter of the "Glasgow" and also on the renewed charter of the "New York."

Held:—First, that evidence was admissible of a custom among ship-brokers that an "introducing broker" should receive renewed commission on every renewal of a charter effected through him, since such a custom was not inconsistent with the written agreement: *Per Martin, B., and Bramwell, B. Pollock, C. B., dissentiente.*

Secondly, that it should have been left to the jury to say whether the agreement to pay commission extended also to the "Glasgow." *Allan and Others, Assignees of Lamont, a Bankrupt, v. Sundius and Others,* 123

(2). The defendant, a shipowner, being desirous of chartering a vessel, the plaintiff, a shipbroker, introduced him to S., another broker, who introduced the defendant to L., who mentioned to B. that the charter was wanted, and through the negotiations of B. with the defendant, D. chartered the vessel. The plaintiff sued for commission, alleging that an "introducing broker" was entitled by custom to a share of the commission. The plaintiffs' counsel proposed to ask a witness the following question:—"What is the custom with regard to payment of broker's commission, when a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?"—Held, that the evidence was properly rejected.

Seemle, that such a custom would be bad in law. *Gibson and Another v. Crick and Another,* 142

SLANDER.

Repetition of Slanderous Words not actionable per se.

Where slanderous words are not actionable per se, no action will lie against the original utterer of the slander for damage resulting from a repetition of it unauthorized by him.

Therefore where the defendant imputed adultery to the plaintiff's wife in his absence, and she voluntarily repeated the slander to her husband, whereby he refused to cohabit with her:—Held, that no action was maintainable against the defendant.

Quere, whether the loss of consortium is ground of special damages. *Parkins and Matilda his Wife v. Scott and Sarah his Wife,* 153

STAGE PLAY.

See THEATRE, (1), (2).

STALLAGE.

See MARKET, (2).

[STAMP.]

When an agreement requiring a stamp is lost, and was without a stamp when last seen,

it will be taken that it never was stamped, and secondary evidence of it cannot be received. *Arbon v. Fussell,* 864]

STATUTE OF FRAUDS.

(1). *Memorandum or Note in Writing of Contract within 17th Section.*

The plaintiff wrote to the defendants, offering to sell them seed of growing turnips, to which the defendants replied asking what turnips he had in growth, their quantities and prices. The plaintiff answered that all that he could offer them at present was the produce of five acres of White Globe seed at 18s. per bushel. The defendants offered to take two or three acres at 16s. 6d. per bushel. The plaintiff replied that he could not accept less than 18s. The defendants then wrote to him as follows:—"In reply to your favour of this morning we beg to say as our neighbours are giving you 18s. per bushel for White Globe turnips, we, as a beginning with you, will take the produce of three acres at that price, to be delivered as soon as harvested, 1861, free of cartage to London Station. Let us know what other sorts, &c., you may have to offer, and also Wurzell seeds of sorts for 1861 harvest. Waiting your reply,—We remain," &c. The plaintiff wrote no answer to this letter; but subsequently saw one of the defendants at their warehouse, on which occasion it was found by the jury that the plaintiff verbally assented to the terms contained in that letter.

Held, that there was a sufficient memorandum or note in writing of the contract within the 17th section of the Statute of Frauds. *Watts v. Ainsworth and Others,* 83

(2). *Signature by Agent within 17th Section.*

The plaintiff, a hop-grower, having sent samples of his hops to his factor, the defendant went to the factor and offered to buy some at 16l. 16s. a cwt. After some negotiation between the defendant, the factor, and the plaintiff, the latter agreed to sell the hops at that price, and the factor wrote in his book, in the presence of the plaintiff and defendant, a memorandum of the bargain in duplicate, one part of which he headed with the name of the defendant and the other part with the name of the plaintiff. The defendant requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. The plaintiff consented, and the alteration was made by the factor, who tore from his book the part of the memorandum headed with the name of the defendant and delivered it to him, and kept the counterfoil in his possession:—Held, that there was evidence for the jury that the factor was the agent of both parties for the purpose of drawing a record of the contract binding on them; and that, if he were, the name of the defendant at the head of that part of the memorandum delivered to

him was a sufficient signature by his agent within the 17th section of the Statute of Frauds. *Durrell v. Evans and Others*, 174

STATUTE OF LIMITATIONS.

See MANDAMUS.

(1). *Acknowledgment of Debt.*

In 1853, H., as principal, and the defendant as surety, gave to the plaintiff their joint and several promissory note for payment of 200*l.* on demand. In 1861, H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter:—"I hereby consent to your receiving the dividend under H.'s assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received the dividend, and in 1862 sued the defendant for the balance of the promissory note.

Held: first, that the letter was not an acknowledgment of the debt, so as to take the case out of the Statute of Limitations.

Secondly, that the letter, coupled with the payment, did not render it more than "only payment" by a co-debtor, so as to take the case out of the 14th section of the Mercantile Law Amendment Act, 1856. *Cockrill v. Sparkes*, 699

(2). *Payment or Satisfaction of Interest on Bond.*

In the year 1833, the plaintiffs, trustees of a marriage settlement, lent to the husband, at interest, some of the money settled to the separate use of his wife, on security of the joint bond of the husband and the defendant. No interest was paid, but, on the 31st October 1847, it was arranged between the plaintiffs and the husband and wife that she should give the plaintiffs her receipt for the interest up to that date, which she accordingly did. She afterwards from time to time gave receipts for each half-year's interest up to November, 1860. No money ever passed.—Held, that the transaction amounted to a payment or satisfaction of the interest so as to take the case out of the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 5. *Amos and Another v. Smith*, 238

(3). *Security for Balance of Banking Account.*

C., being about to open an account with a banking Company, gave them a promissory note, dated the 4th of December, 1855, whereby he and S., the defendant, jointly and severally promised to pay to the Company, on demand, 200*l.* At the same time they signed and delivered to the Company a memorandum stating that the note was given as a collateral security for the banking account intended to be kept by C., and that the Company should be at liberty at any time thereafter to recover from them, or each of them, up to the full

amount thereof, every sum which C. should at any time thereafter become indebted or liable to the Company, for any moneys paid, lent, or advanced by them to or for him; and in case of the Company suing on the note, its production should be conclusive evidence of the amount claimed by them from C. being due and owing by him. The banking account was accordingly opened with C., and on the 31st December, 1855, he was indebted to the Company in 173*l.* No demand of payment was made, or balance struck, until the 30th June, 1856, when 194*l.* was due from C. to the Company. A balance was afterwards struck every half-year, the Company from time to time making advances, and C. paying money into the bank with which his account was credited. The sums so credited exceeded the amount of the note. The account continued until February, 1861, when it was closed with a balance due to the Company of 175*l.* In March, 1862, the Company commenced an action against the defendant on the note:—Held, that the cause of action was not barred by the Statute of Limitations. *Hartland, Public Officer of the Gloucestershire Banking Company, v. Jukes and Others, Executors and Executrix of William Steward, deceased*, 667

SUCCESSION DUTY ACT, 1853.

(16 & 17 Vict. c. 51.)

(1). *Succession derived from Customs' Annuity Benevolent Fund.*

A., an officer of Customs, subscribed to the "Customs' Annuity and Benevolent Fund" for the capital sum of 500*l.* This Fund, which was established by the 56 Geo. 3, c. lxxiii., is raised on the principle of life insurance by the quarterly subscriptions of the officers of Customs, a contribution of poundage deducted from their salaries, and the profits derived from the publication of the "Customs Bills of Entry." By the rules and regulations made under the authority of that Act, if an annuity be insured for the benefit of the widow of a subscriber, equal to one-third of the whole insurance, the subscriber is empowered to direct by his will or instrument in writing that the capital money insured shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or his nominee if duly admitted by the directors of the Fund. Where there is no widow or nominee, the whole capital money is subject to the directions of the subscriber. If the subscriber shall not have applied it, it becomes the property of his children. If no child, it is to be appropriated to increase the widow's annuity. If no widow or child, the capital money is to be paid to the personal representatives of the subscriber, to be by them applied according to the Statute of Distributions. A., who was never married, by his will gave the capital money to his sister.—Held, that she

took a succession within the meaning of the 2d section of the Succession Duty Act, 1854, and that A. was the predecessor; and consequently she was chargeable with duty on the capital money. *The Attorney-General v. Abdy*, 266

(2). *Creation of New Succession by Devise of Reversion.*

A testator who died before the 19th May, 1853 (the day on which the Succession Duty Act came into operation), devised a reversion, in respect of which he would not have been liable to succession duty, if it had vested in possession in his lifetime after that date.—Held, that he thereby created a new succession which was not exempt from duty under the 15th section of the Act.

Therefore where A. (who died before the 19th of May, 1853), devised to C., a stranger in blood, a reversionary property to which he had become entitled by the exercise of a power of appointment contained in a settlement made by himself:—Held, that when, on the death of the tenant for life (which happened after the 19th of May, 1853), the property vested in possession, C. took a succession under the devise upon which duty was payable at the rate of 10l. per cent. *The Attorney-General v. Gardner*, 639

[(3). *Who Predecessor—Power of Appointment—Exercise of joint power—Portions.*

H. B., tenant for life, and W. J. B., his eldest son, tenant in tail in remainder, suffered a recovery, and in 1821, by virtue of a joint power of appointment, which they exercised, resettled the estates to the use of the father for life, with remainder to the son for life, with remainders to his sons in tail male, with remainder to G. B. and the son of H. B. for life, with remainder to his sons in tale male. The father died in 1834, and his son entered into possession, but died in 1856, without issue. G. B. then came into possession, and joined with his son E. G. B. in disentailing the estates; and by virtue of a power of appointment reserved to them, conveyed the estates to the defendants for a term of 500 years, upon trust in case the son survived his father (an event which happened), to pay him an annuity during his life; and power was given to the father to raise portions for younger children, which power he exercised:—Held (reversing the decision of the Court of Exchequer), that the Crown was entitled to duty at 3l. per cent. in respect of the succession of G. B., as having been derived from his elder brother W. J. B., as predecessor; that the same amount of duty was payable in respect of the succession of E. G. B., as having been derived under a disposition made by himself at the time when he was expectantly entitled to the estates, upon a succession derived from W. J. B., as predecessor; and further, that the same amount of duty was paya-

ble in respect of the portions of the younger children, as being derived from either their niece W. J. B., or their own brother E. G. B., as predecessor. *Attorney-General v. Flayer*, 865]

SUMMONS.

See INFORMATION.

WRIT OF SUMMONS.

TAXES.

See ASSESSED TAXES.

TENANTS IN COMMON.

See PLEADING, (2).

TENANT FOR LIFE.

See DEED.

TENEMENT.

See THEATRE, (1).

THEATRE.

- (1). "*Tenement*" within the Meaning of 2 & 3 Vict. c. 47, s. 46.

A portable theatre or booth consisting of two caravans or wagons drawn from place to place by horses, and when joined together forming a temporary structure for the performance thereon of stage plays, is not a "tenement" within the meaning of the 2 & 3 Vict. c. 47, s. 46. *Fredericks, Appellant, and Howie, Respondent*, 381

- (2). "*Place*" within the Meaning of 6 & 7 Vict. c. 68, s. 11.

A booth theatre, which is taken to pieces, and carried from place to place for theatrical representations, is a "place" within the meaning of the 11th section of the 6 & 7 Vict. c. 68, and a person causing a stage play to be acted therein for hire, is liable to the penalty imposed by that section, if it be not licensed, and not a patent theatre. *Fredericks, Appellant, Payne, Respondent*, 584

TITLE-DEEDS.

See DEED.

TOLL.

See MARKET, (1), (2).

TOWN IMPROVEMENT ACT.

(2 & 3 VICT. c. lxxii.)

See MANDAMUS.

TRESPASS.

See EQUITABLE PLEA, (2).

Pulling down House when Plaintiff and his Family were in it.

A declaration in trespass alleged that the

defendant broke and entered the plaintiff's dwelling-house and land, which dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and whilst the plaintiff was therein pulled down and destroyed the dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein, and ejected and expelled him and his family therefrom; and seized, converted, and destroyed the materials of the house. The defendant pleaded, as to breaking and entering, pulling down and destroying the dwelling-house and fixtures thereon, and seizing the materials, that he was entitled to common of pasture over the said land, and because the house was wrongfully erected on the land, so that without pulling down the same the defendant could not use or enjoy the common of pasture in so ample and beneficial manner as he otherwise would and ought to have done, he necessarily and unavoidably committed the trespasses in the introductory part of the plea mentioned in removing the house, doing no unnecessary damage, &c.

Held, that the plea was bad, since the defendant was not justified in pulling down the house when the plaintiff and his family were in it. *Jones v. Jones and Others*, 1

TROVER.

See CONTRACT.

TRUST.

Trusts of Deed executed by Statute of Uses—Conveyance to Uses.

In 1802, by indenture, reciting an intended marriage between L. and M., and that after the death of certain relations L. was entitled under the will of his uncle to five messuages; in consideration of the intended marriage, and of 5s. paid, L. granted, bargained, sold, assigned, and set over unto R. and J. the reversion, or such other estate as he was entitled to under the will of his uncle, "upon the trusts and to and for the uses" thereafter declared, i. e. upon trust to "permit and suffer M." and her assigns, during her life, to receive the issues and profits for her sole use, her receipts alone to be sufficient discharges for the same; and after her death in trust for L.; and after the decease of the survivor, in trust for such one or more of the children of L. and M. as they should by deed jointly appoint. In 1829, L. and M., by deed, executed the power, and granted, bargained, sold, and released the reversion in the messuages to such uses as P., their son, should by deed appoint. In 1839, P., by deed, conveyed the reversion to N. M. received the rents during her life, and L. after her death. No rent was received by P. or N. In ejectment by N.:—Held: First, that the deed of 1802 was admissible in evidence against the defendant, although neither P. nor the plaintiff had been in receipt of the rents.

VENDOR AND VENDEE.

Secondly, that the trusts of the deed of 1802 were executed by the statute (with the exception, perhaps, of that for the wife), and therefore P. took a legal estate by the appointment under the deed of 1829.

Thirdly, that the deed of 1802 was not a bargain and sale properly so called, but a conveyance to uses. *Nash v. Ash*, 160

USURY.

Bills of Exchange in renewal of Bills given for Payment of Money lent with Usurious Interest while the Usury Law was in force.

Bills of exchange given after the repeal of the usury law, in renewal of bills given while that law was in force, to secure payment of money lent with usurious interest, are valid, the receipt of the money being a sufficient consideration to support a new promise to pay it.—Per Pollock, C. B., and Wilde, B. Dissentiente Martin, B. *Flight v. Reed*, 703

VENDOR AND VENDEE.

(1). *Purchase of Article to be Manufactured—Delivery of Article with Defect which Vendee might have discovered on Inspection—Fraud.*

If a person purchases an article which is to be manufactured for him, and the manufacturer delivers it with a patent defect which may render it worthless, if the purchaser has had an opportunity of inspecting it, but has neglected to do so, the manufacturer is not guilty of fraud in not pointing out the defect.

The defendant employed the plaintiff to make for him a steel gun for which he was to pay by two bills of exchange. The plaintiff delivered the gun with a defect in it which the plaintiff might have seen on examination, and which would have justified him in refusing to receive it. The defendant without examining the gun accepted and delivered to the plaintiff the bills of exchange. Afterwards the plaintiff, in a letter to the defendant, stated that the gun was of the best metal all through and had no weak points that the plaintiff was aware of. The gun was tried and at first answered well, but after repeated trials burst in consequence of the defect in it. The plaintiff having sued the defendant on one of the bills, he pleaded that he was induced to accept the bill by the fraud of the plaintiff.—Held, that there was no evidence for the jury in support of the plea. *Horsfall and Another v. Thomas*, 90

(2). *Purchase by unauthorized Agent representing himself as Principal.*

The plaintiff, a manufacturer, called at the place of business of "Gandell & Co." for orders for goods. At that time the firm consisted of Thomas Gandell only, and the business was managed by Edward Gandell, a clerk. On inquiring for Messrs. Gandell, the plain-

tiff was directed to a counting-house where he saw Edward Gandell, who led the plaintiff to believe that he was one of the firm of Gandell & Co., and under that belief, at the request of Edward Gandell, the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to "Edward Gandell & Co." Edward Gandell, who, unknown to the plaintiff, carried on business with one Todd, pledged the goods with the defendant for advances *bonâ fide* made to Gandell & Todd, and the defendant afterwards sold the goods under a power of sale.—Held, that there was no contract of sale, inasmuch as the plaintiff believed that he was contracting with Gandell & Co., and not with Edward Gandell personally, and Gandell & Co. never authorized Edward Gandell to contract for them; consequently no property passed, and the defendant was liable in trover for the amount realized by the sale. *Hardman and Others v. Booth*, 803

WARRANTY.

- (1). *Representations amounting to Warranty—Admissibility of Evidence that no Warranty was in fact contemplated.*

Where representations, which may amount to a warranty, are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of showing that no warranty was contemplated by the parties.

In an action for a breach of warranty of a yacht sold by the defendant to the plaintiff, it appeared that the plaintiff's agent, having entered into negotiations for the purchase of the yacht, told the defendant's agent that he must have the masts overhauled or examined by a shipwright. The defendant's agent subsequently wrote:—"I have had a good overhaul at the masts, and find they are all as sound as ever." The plaintiff's agent then wrote to the defendant offering 3000*l.* for the yacht, and observing that the plaintiff would probably have to spend 500*l.* in repairs. The defendant wrote in reply declining to take less than 3500*l.*, and saying:—"You must, I think, be under some very great error in thinking that 500*l.* would be required to be spent. Beyond the usual painting, caulking, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. Personally I know her seagoing qualities, and how thoroughly sound she is and tight in every part." In a subsequent letter the defendant said:—"Her masts have been examined and found as sound as when put in." After some further correspondence the plaintiff bought the vessel for 3375*l.*, and a bill of sale was executed in accordance with "The Merchant Shipping Act, 1854."—Held, that, assuming the representations in the letters were some evidence of a warranty, it was competent for the defendant to prove by what passed between

the parties both before and after the letters were written, that no warranty was contemplated.

Seemle, that the representations in the letters did not amount to a warranty.

Quære, whether it was competent for the plaintiff to set up a warranty, inasmuch as none was contained in the bill of sale. *Stucley, Bart., v. Baily*, 405

[(2.) *Sale of specific Chattel, or of thing to be manufactured—Refuse.*

The production of garrancine is known to be the only purpose for which spent madder can be used. The defendant bought of the plaintiffs a boat-load of spent madder, and it proved insufficient in the production of garrancine. On an action for the price—Held, that the judge rightly asked the jury to find whether the article sold could reasonably be said to be spent madder, and rightly refused to ask whether it was fit to make garrancine.

Per Pollock, C. B.—Refuse does not come under the general rule, that an article is warranted fit for the purpose for which it is known to be bought. *Turner v. Mucklow*, 859]

WATERCOURSE.

See LESSOR AND LESSEE.

WAY.

The owner of a plot of ground built upon it a house facing the highway, and at the back of the garden of the house he built a cottage. The access to the cottage was from the highway down a passage by the side of the house and its garden wall. The first floor of the house extended over part of this passage, and there was a door in the wall of the house and another door in the garden wall which opened into the passage. Across the passage about three feet from the back wall of the house there was another door, and this part of the passage was covered by a slab or "lean-to" which was cemented to the back part of the house. In 1851 the owner conveyed the cottage in fee to the defendant by the dimensions and abutments delineated in a plan, "be the same more or less." The plan described the defendant's land as eighty-seven feet six inches, of which five feet six inches consisted of a part of the passage over which the first floor of the house was built. In 1853 the owner conveyed the house in fee to the plaintiff. The deed purported to convey the whole of that part of the passage over which the first floor of the house was built; but there was no mention of any right of way. In 1861 the defendant blocked up the door in the wall of the plaintiff's house and in his garden wall. These doors had been used by the occupiers of the house for the purpose of going from it to a water-closet in the garden, but there was another way through the kitchen, a window of which opened into the garden.

Held:—That the plaintiff had no right of way over the passage either by grant or of necessity. *Dodd v. Burchell*, 113

WILL.

See DEVISE.

WITNESS.

See COSTS, (1).

EVIDENCE, (2).

WRIT OF POSSESSION.

See EJECTMENT.

WRIT OF SUMMONS.

See PRACTICE, (2).

- (1). *Computation of the Six Months during which Writ is in Force.*

The six months during which a writ of sum-

mons continues in force, after its renewal, are to be computed inclusive of the day of renewal.

Therefore where a writ of summons was originally issued on the 23d of January, 1861, and successively renewed, the last renewal being on the 19th of July, 1862, and on Monday the 19th of January, 1863, the officer, on being applied to, declined to impress the renewal seal on the writ:—The Court held that the writ had expired, and refused to direct the officer to impress the seal, *nunc pro tunc*, as of that date. *Anonymous*, 664

- (2). *Non-Endorsement by Process Server of Time of Service.*

A process server is not liable to an action for a breach of duty in neglecting to endorse on a writ of summons the time of service, as required by the 15th section of the Common Law Procedure Act, 1852. *Curlew v. Broad*, 322



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